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APPEALS TO THE
INFORMATION AND
PRIVACY
COMMISSIONER ...



Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER M-82

Appeal M-910344

The Corporation of the City of Hamilton



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ORDER

BACKGROUND:

The Corporation of the City of Hamilton (the City) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to records relating to the City's investigation of the requester's complaint of harassment. The City identified 36 responsive records, including information provided by the requester, the two employees named in the complaint, other employees and former employees, and the findings of the investigation. The City granted access to the requester's draft complaint, supporting information provided by the requester, and his final complaint form. The City also granted access to a letter sent to the department head advising of the complaint, a letter sent to the requester during the investigation, a letter sent to the requester following completion of the investigation, and a letter regarding the requester's new position. Access was denied to the remaining records pursuant to sections 10(1)(d), 14, 38(b) and (c) of the Act. The requester appealed the head's decision.

Mediation of the appeal was not successful, and notice that an inquiry was being conducted to review the City's decision was sent to the appellant, the City, the two employees named in the complaint (the affected persons), and six individuals named in the records. Written representations were received from the City, the appellant, the affected persons, and two of the individuals named in the records.

The records at issue in this appeal are identified in Appendix A, attached to this order.

ISSUES:

The issues in this appeal are as follows:

- A. Whether the information contained in the records qualifies as personal information as defined in section 2(1) of the Act.
- B. If the answer to Issue A is yes, whether the discretionary exemption provided by section 38(b) of the Act applies.
- C. If the answer to Issue A is yes, whether the discretionary exemption provided by section 38(c) of the Act applies.
- D. Whether the records qualify for exemption under section 10(1)(d) of the Act.
- E. If the answer to Issues A and D is yes, whether the discretionary exemption provided by section 38(a) of the Act applies.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether the information contained in the records qualifies as "personal information" as defined in section 2(1) of the Act.

"Personal information" is defined in section 2(1) of the Act, in part, as "... recorded information about an identifiable individual, ...".

The records consist of notes, letters and memoranda created during the City's investigation of the appellant's complaint that he was being harassed by the affected persons. Primarily, the records contain the personal information of the appellant and the affected persons. Records 2E, 4C, 4E and 4L contain the personal information of the appellant only, and Record 4D does not contain any personal information. A small portion of some of the records contains recorded information about other identifiable individuals namely, other employees or former employees of the work area where the harassment is alleged to have taken place, and qualifies as the personal information of these individuals.

In my view, the records do not contain the personal information of five of the six individuals notified of the inquiry, including the two individuals who provided written representations. The information provided by these individuals consists of recorded information about the appellant and/or the affected persons, not recorded information about themselves.

ISSUE B: If the answer to Issue A is yes, whether the discretionary exemption provided by section 38(b) of the Act applies.

The City submits that section 38(b) applies to all of the records.

Section 36(1) of the Act gives individuals a general right of access to personal information about themselves, which is in the custody or under the control of an institution. However, this right of access is not absolute. Section 38 provides a number of exemptions to this general right of access. One such exemption is found in section 38(b) of the Act, which reads as follows:

A head may refuse to disclose to the individual to whom the information relates personal information,

if the disclosure would constitute an unjustified invasion of another individual's personal privacy;

As has been stated in a number of previous orders, section 38(b) introduces a balancing principle. The head must look at the information and weigh the requester's right of access to his or her own personal information against other individuals' right to the protection of their privacy. If the head determines that the release of the information would constitute an unjustified invasion of the other individuals' personal privacy, then section 38(b) gives the head the discretion to deny the requester access to the personal information (Order 37).

In Issue A, I found that Records 2E, 4C, 4E, and 4L contain the personal information of the appellant only, and Record 4D does not contain any personal information. Accordingly, section 38(b) does not apply to these records.

Sections 14(2) and (3) of the Act provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. Section 14(3) lists the types of information the disclosure of which is presumed to constitute an unjustified invasion of personal privacy. The City claims that sections 14(3)(d) and (g) apply to job evaluations, personnel reports and employee interactions included in the records. These sections state:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,

- (d) relates to employment or educational history;
- (g) consists of personal recommendations or evaluations, character references or personnel evaluations;

The records contain information concerning employment related incidents involving the appellant and other individuals. However, in my view, the information which relates to individuals other than the appellant cannot accurately be characterized as the employment history of any of these individuals, and I find that section 14(3)(d) does not apply.

Although, in a broad sense, it could be argued that the comments of the author of the records are "evaluations" of individuals other than the appellant, in my view, it is not possible to characterize the author's comments as "personal evaluations" or "personnel evaluations" of these individuals. The records were created during an investigation to determine whether the actions of the affected persons were in violation of the City's policy on personal harassment. The conclusions reached as a result of the investigation are based on whether this policy has been

complied with, and have no "personal" or "personnel" component, as required by section 14(3)(g). Accordingly, in my view, section 14(3)(g) does not apply to the information contained in the records.

Section 14(2) of the Act provides some criteria to be considered in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy. The City and the affected persons submit that sections 14(2)(f) and (h) are relevant in the circumstances of this appeal, and weigh in favour of privacy protection. The appellant submits that section 14(2)(d) is relevant, and weighs in favour of disclosure of the records. These sections read:

A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,

- (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;
- (f) the personal information is highly sensitive;
- (h) the personal information has been supplied by the individual to whom the information relates in confidence;

In order for section 14(2)(d) to be regarded as a relevant consideration, the appellant must establish that:

- (1) the right in question is a legal right which is drawn from the concepts of common law or statute law, as apposed to a non-legal right based solely on moral or ethical grounds; **and**
- (2) the right is related to a proceeding which is either existing or contemplated, not one which has already been completed; **and**
- (3) the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; **and**

- (4) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing.

[Order P-312]

The appellant submits that several rights have been violated due to the fact that the information contained in the records has not been disclosed by the City: his right to a fair job evaluation; his right to a complete and unbiased harassment investigation and grievance procedure; his right to a manageable working environment; and his right to be measured against job standards that have not been established in a discriminatory manner. With the exception of the grievance procedure, in my view, these are not legal rights drawn from the concepts of common law or statute law, and section 14(2)(d) is not a relevant consideration for them.

Regarding the grievance procedure, it is not clear whether the subject matter of the appellant's grievance is the same as that involved in his harassment complaint. Having examined the records, in my view, section 14(2)(d) may be a relevant consideration for the grievance procedure in the circumstances of this appeal.

The City submits that all information that pertains to working relationships and workplace conduct is highly sensitive. The affected persons submit that some of their comments could, in another individual's perception, "... form the basis for a personal injury claim ...", and would adversely affect working relationships.

In my opinion, information that pertains to normal, everyday working relationships and workplace conduct is not highly sensitive. However, when an allegation of harassment is made and investigated, it is reasonable for the parties involved to restrict discussion of workplace relationships and conduct and to find such information distressing in nature, as the affected persons have indicated here. Nevertheless, in my view, it is not possible for such an investigation to proceed if the complaint is not made known to the respondents and the direct response to the allegations made in the complaint is not made known to the complainant. Accordingly, I find that section 14(2)(f) is a relevant consideration in the circumstances of this appeal, but only in respect of the information provided by individuals other than the appellant, and not in respect of the information provided by the affected persons in direct response to the appellant's complaint.

The City and the affected persons submit that all of the information was supplied under verbal assurances of confidentiality by the City. The City has also provided a copy of its personal harassment policy, which provides that all information concerning such complaints is to be kept confidential. Some of the records are marked as private and confidential, and the affected person indicated in one record that certain parts of it were confidential.

The appellant submits that at the outset of the investigation, he was informed that the affected persons would be asked to respond to his complaint, and he would have the opportunity to view the responses in order to enable him to respond. During the investigation of the appellant's complaint, the affected persons were given a copy of the complaint and the opportunity to respond. The appellant submits that the responses were not disclosed to him, and he had no opportunity to respond to them. Following interviews with the complainant, the affected persons and witnesses, the appellant's allegations were determined by the City to be unfounded.

In my view, it is neither practical nor possible to guarantee complete confidentiality to each party during an internal investigation of an allegation of harassment in the workplace. If the parties to the complaint are to have any confidence in the process, respondents in such a complaint must be advised of what they are accused of and by whom to enable them to address the validity of the allegations. Equally, complainants must be given enough information to enable them to ensure that their allegations were adequately investigated. Otherwise, others may be discouraged from advising their employer of possible incidents of harassment and requesting an investigation, which runs counter to a policy the purpose of which is to promote a fair and safe workplace. Accordingly, in my view, section 14(2)(h) is a relevant consideration, but only in respect of the information provided by individuals other than the appellant, and not in respect of information provided by the affected persons in direct response to the appellant's complaint.

In summary, I have found that section 14(2)(d) may be relevant, and sections 14(2)(f) and (h) are relevant considerations in the circumstances of this appeal, but only in respect of the information provided by individuals other than the appellant, and not in respect of information provided by the affected persons in direct response to the appellant's complaint. Sections 14(2)(f) and (h) weigh in favour of privacy protection, and in my view, disclosure of the information provided by individuals other than the appellant and by the affected persons other than in direct response to the appellant's complaint would constitute an unjustified invasion of another individual's personal privacy, and section 38(b) applies. I have highlighted these portions of the records on the copy of the records which is being forwarded with the City's copy of this order.

In respect of the information provided by the appellant and the information provided by the affected persons in direct response to the appellant's complaint, I have found that section 14(2)(d) may be relevant and this factor would weigh in favour of disclosure of the records. In balancing the interests of the appellant in disclosure of the personal information and the interests of the affected persons and other named individuals in the protection of their privacy, I find that disclosure of the information provided by the appellant and the information provided by the affected persons in direct response to the appellant's complaint would not constitute an unjustified invasion of the personal privacy of another individual, and section 38(b) does not apply.

In reviewing the City's exercise of discretion in favour of refusing to disclose the records and parts of records for which I have found section 38(b) to apply, I have found nothing to indicate that the exercise of discretion was improper, and will not alter it on appeal.

ISSUE C: If the answer to Issue A is yes, whether the discretionary exemption provided by section 38(c) of the Act applies.

The City submits that section 38(c) applies to all of the records. This section reads:

A head may refuse to disclose to the individual to whom the information relates personal information,

that is evaluative or opinion material compiled solely for the purpose of determining suitability, eligibility or qualifications for employment or for the awarding of contracts and other benefits by an institution if the disclosure would reveal the identity of a source who furnished information to the institution in circumstances where it may reasonably have been assumed that the identity of the source would be held in confidence;

In Issue A, I found that Record 4D does not contain any personal information. Accordingly, section 38(c) does not apply to this record.

To qualify for exemption under section 38(c), the personal information contained in a record must satisfy each part of a three-part test:

1. the personal information must be evaluative or opinion material;
and
2. the personal information must be compiled solely for the purpose of determining suitability, eligibility or qualifications for employment or for the awarding of government contracts and other benefits; **and**
3. disclosure of the personal information would reveal the identity of a source who furnished information to the institution in

circumstances where it may reasonably have been assumed that the identity of the source would be held in confidence.

[Order 157]

The City submits that the records consists of evaluative material about the appellant and opinion material about the appellant, co-workers, management, witnesses and the union. Having reviewed the records, I am satisfied that parts of some of the records do contain evaluative and opinion material about the appellant, and the requirements of the first part of the test have been met.

The City submits that the evaluations and opinions were performed during the internal harassment investigation, and that "the information was not compiled for any other purpose than to investigate the allegations [of personal harassment] put forth by [the appellant]." While individuals may have made comments about the appellant's suitability for employment during the investigation, I do not accept that the sole purpose for compiling the information was to determine the appellant's suitability, eligibility or qualifications for employment. Further, the City indicates that the only purpose for compiling the information was something else entirely. In my view, the requirements of the second part of the test have not been satisfied.

Failure to satisfy a single part of the test means that the appellant's personal information contained in the records cannot be exempted pursuant to section 38(c). Accordingly, I find that section 38(c) does not apply.

ISSUE D: Whether the records qualify for exemption under section 10(1)(d) of the Act.

The City submits that section 10(1)(d) applies to the records. This section reads:

A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, if the disclosure could reasonably be expected to,

reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

The introductory wording of section 10(1) requires that the information must have been supplied to the City, the "institution", by a third party which, by definition, is not part of the institution. The City's employees are part of the institution, and do not qualify as third parties for the purposes of section 10. The former employees are not part of the institution and it could be argued that they are properly considered third parties for the purposes of section 10. However, in my view, the interests of the former employees are more appropriately addressed under the privacy protection provisions of the Act.

Because I have found that the answer to Issue D is no, it is not necessary for me to consider Issue E.

ORDER:

1. I uphold the City's decision not to disclose Records 2A, 2C, 2D, 2F, 2G, 3A, 3C, 3D, 4G, 4H, 4K and part of Record 5C pursuant to section 38(b).
2. I order the City to disclose to the appellant Records 1D, 1F, 1G, 1H, 2E, 4C, 4D, 4E, 4I, 4J and 4L in their entirety. I also order the City to disclose to the appellant Records 2B, 3B, 4A, 4B, 4F, 5B and 5D in accordance with the highlighted copy of these records which I have provided to the Freedom of Information and Privacy Coordinator with the copy of this order. The highlighted portions identify the parts of these records which should not be disclosed.
3. I order the City to disclose the records referred to in Provision 2 within 35 days following the date of this order and **not** earlier than the thirtieth (30th) day following the date of this order.
4. In order to verify compliance with the provisions of this order, I order the City to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 2, **only** upon my request.

Original signed by: _____
Holly Big Canoe
Inquiry Officer

February 9, 1993 _____

APPENDIX A

Record	Description	City's Decision	Order
1A	Rough draft of complaint form	Disclosed	n/a
1B	Exhibits 1-8 (complainant's supporting information)	Disclosed	n/a
1C	Final complaint form	Disclosed	n/a
1D	Notes from meeting between appellant and investigators	Exempted	Disclose
1E	Copy of letter sent to appellant	Disclosed	n/a
1F	Notes from meeting between appellant and investigator	Exempted	Disclose
1G	Notes from meeting between appellant and investigator	Exempted	Disclose
1H	Notes from meeting between appellant and investigator	Exempted	Disclose
2A	Copy of letter sent to affected person advising of complaint	Exempted	Exempt 38(b)
2B	Affected person's written response to complaint	Exempted	Partially exempt 38(b)
2C	Investigator's notes on affected person's written response	Exempted	Exempt 38(b)
2D	Notes from meeting between affected person and investigators	Exempted	Exempt 38(b)
2E	Notes provided by affected person	Exempted	Disclose
2F	Notes from meeting between affected person and investigators	Exempted	Exempt 38(b)
2G	Notes from telephone conversation between affected person and investigator	Exempted	Exempt 38(b)
3A	Copy of letter sent to affected person advising of complaint	Exempted	Exempt 38(b)
3B	Affected person's written response to complaint	Exempted	Partially exempt 38(b)

Record	Description	City's Decision	Order
3C	Notes from meeting between affected person and investigator	Exempted	Exempt 38(b)
3D	Notes from meeting between affected person and investigators	Exempted	Exempt 38(b)
4A	Notes from telephone conversation between investigator and union representative	Exempted	Partially exempt 38(b)
4B	Copy of memorandum sent to Human Resources from management	Exempted	Partially exempt 38(b)
4C	Notes from meeting between investigator and Manager of Labour Relations	Exempted	Disclose
4D	Note made by investigator	Exempted	Disclose
4E	Notes of conversation between investigator and management	Exempted	Disclose
4F	Notes from meeting between management and investigators	Exempted	Partially exempt 38(b)
4G	Notes from meeting between witness and investigators	Exempted	Exempt 38(b)
4H	Notes from telephone conversation between witness and investigator	Exempted	Exempt 38(b)
4I	Notes from telephone conversation between management and investigator	Exempted	Disclose
4J	Copy of memorandum sent to management from affected person	Exempted	Disclose
4K	Notes from telephone conversation between witness and investigator	Exempted	Exempt 38(b)
4L	Notes from meeting between management and investigator	Exempted	Disclose
5A	Copy of letter sent to management advising of complaint	Disclosed	n/a

Record	Description	City's Decision	Order
5B	Copy of findings sent to management	Exempted	Partially exempt 38(b)
5C	Copies of letters sent to appellant and affected persons following completion of investigation	Partially Exempt	Partially exempt 38(b) (Upheld)
5D	Response to findings from management	Exempted	Partially exempt 38(b)
5E	Letter to Human Resources regarding appellant's new position	Disclosed	n/a



Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

O R D E R M - 3

**RE: HAMILTON-WENTWORTH REGIONAL BOARD
 OF COMMISSIONERS OF POLICE**

APPEAL NUMBER M-910133



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O R D E R

BACKGROUND:

On March 19, 1991, the Hamilton-Wentworth Regional Police received a request for a copy of a report dated "October or November, 1990" containing information about an incident which occurred at the O'Toole's Restaurant in Hamilton, Ontario. Although the request was received by the Hamilton-Wentworth Regional Police, for purposes of the Municipal Freedom of Information and Protection of Privacy Act, 1989, (the "Act"), the "institution" is the Hamilton-Wentworth Regional Board of Commissioners of Police.

On March 20, 1991, the institution advised the appellant that disclosure of the records "may affect the interests of a third party." In accordance with section 21(1)(b) of the Act, the institution notified a third party of the request, and solicited the third party's views as to whether the records should be disclosed.

On April 15, 1991, the institution informed the appellant that partial access to the records had been granted. A one page document entitled "Supplementary Report", dated November 21, 1990, with severances, was enclosed with the institution's decision letter to the appellant. Access to the remainder of the records was denied pursuant to sections 8(1)(e), 14(2)(e), 14(3)(b), 14(3)(d), 14(3)(g), 38(a), and 38(b) of the Act.

The appellant appealed the decision of the institution. The appellant indicated that he had no interest in gaining access to the identity of anyone who may have made any statements included in the records, but only in what was said.

The Appeals Officer obtained and reviewed a copy of the records. They consist of four one page documents identified as an "Offence Form", two "Supplementary Reports" (one of which had already been partially disclosed to the appellant), and a "Suspect Description" report.

In an attempt to mediate this appeal, the Appeals Officer discussed the request with the institution. The institution then granted partial access to the "Suspect Description" report dated November 19, 1991. The appellant had previously been denied access to this entire document.

This further disclosure did not satisfy the appellant and it became apparent that further mediation would not be possible. What remains at issue is the narrative portion of two one page forms, namely, the "Offence Form", and one of the "Supplementary or Incident Reports", dated November 19, 1990.

A Notice of Inquiry was sent to the appellant, the institution, and to the third party who had been notified of the request by the institution (the "affected person"), enclosing a report prepared by the Appeals Officer. The purpose of this report is to assist the parties in making their representations to this office concerning the subject matter of the appeal. The report outlines the facts of the appeal and sets out questions which paraphrase those sections of the Act which appear to be relevant to the appeal. It also advises parties that, in making their representations, they need not limit themselves to the questions set out in the report.

Written representations were received from the institution and the affected person.

In its representations, the institution claimed that section 8(2)(a) of the Act applied and, accordingly, the appellant was notified by this office of this new claim.

ISSUES:

The key issues arising in this appeal are as follows:

- A. Whether the information contained in the requested records qualifies as "personal information", as defined by section 2(1) of the Act.
- B. Whether the requested records are properly exempt from disclosure pursuant to the discretionary exemption provided by section 38(b) of the Act.
- C. Whether the requested records would qualify for exemption under section 8(1)(e) of the Act.
- D. Whether the requested records would qualify for exemption under section 8(2)(a) of the Act.
- E. Whether the requested records are properly exempt from disclosure pursuant to the discretionary exemption provided by section 38(a) of the Act.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether the information contained in the requested records qualifies as "personal information", as defined by section 2(1) of the Act.

Section 2(1) of the Act states, in part:

"personal information" means recorded information about an identifiable individual, including,

- (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,

(b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,

...

(d) the address, telephone number, fingerprints or blood type of the individual,

(e) the personal opinions or views of the individual except where they relate to another individual,

...

(g) the views or opinions of another individual about the individual, and

(h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

In my view, the statements and/or allegations contained in the records are considered recorded information about identifiable individuals - the appellant and the affected person. Further, I find that these statements and/or allegations are properly considered the personal information of both the appellant and the affected person within the definition of personal information contained in section 2(1).

ISSUE B: Whether the requested records are properly exempt from disclosure pursuant to the discretionary exemption provided by section 38(b) of the Act.

Section 36(1) of the Act gives individuals a general right of access to personal information about themselves, which is in the custody or under the control of an institution. However, this right of access is not absolute; section 38 provides a number of exceptions to this general right of access to personal information by the person to whom it relates.

Specifically, section 38(b) of the Act states:

A head may refuse to disclose to the individual to whom the information relates personal information,

- (b) if the disclosure would constitute an unjustified invasion of another individual's personal privacy;

Section 38(b) introduces a balancing principle. The head must look at the information and weigh the requester's right of access to his/her own personal information against another individual's right to the protection of their privacy. If the head determines that release of the information would constitute an unjustified invasion of the other individual's personal privacy, then section 38(b) gives the head the discretion to deny access to the personal information of the requester.

Sections 14(2) and (3) of the Act provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy of an individual other than the requester. Section 14(2) provides some criteria for the head to consider in making this determination. Section 14(3) lists a series of circumstances which, if present, would raise the presumption of an unjustified invasion of personal privacy.

The institution specifically relied on the application of sections 14(3)(b), (d) and (g) to raise the presumption that disclosure of the records at issue would constitute an unjustified invasion of personal privacy. Reliance was also placed on the provisions of section 14(2)(e).

Sections 14(3)(b), (d) and (g) of the Act read as follows:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,

- (b) was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;
- (d) relates to employment or educational history;
- (g) consists of personal recommendations or evaluations, character references or personnel evaluations;

Section 14(2)(e) of the Act states:

A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,

- (e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;

I will first address the application of section 14(3)(b). I have considered the circumstances under which the records at issue were created and the steps taken during the course of the investigation by the Hamilton-Wentworth Regional Police. Having reviewed these circumstances, it is my view that the personal information contained in the records at issue was compiled and is identifiable as part of an investigation into a possible violation of law. Accordingly, the requirements for a presumed unjustified invasion of personal privacy of an individual other than the requester under section 14(3)(b) have been satisfied.

Once it has been determined that the requirements for a presumed unjustified invasion of personal privacy have been established, I must then consider whether any other provisions of the Act come into play to rebut this presumption.

In dealing with this issue, I have carefully considered the records at issue, the representations which have been provided, and the provisions of the Act which may rebut the presumption of an unjustified invasion of personal privacy. Having done so, I find that the presumption raised by section 14(3)(b) of the Act has not been rebutted. Therefore, it is not necessary for me to consider the application of sections 14(3)(d) and (g) or section 14(2)(e).

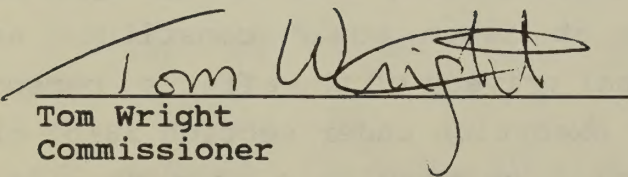
In the circumstances of this particular case, I am of the opinion that disclosure of the records at issue would constitute an unjustified invasion of the personal privacy of the affected person and, therefore, would qualify for exemption under section 38(b) of the Act. It is generally desirable to provide a more detailed explanation of reasons for reaching this conclusion. However, in this case, I have limited my explanatory remarks because of my concern that further explanation could, in itself, interfere with the personal privacy of another person.

The institution has provided submissions regarding the exercise of discretion to refuse to disclose the records at issue and I am satisfied that the discretion has been exercised in accordance with established legal principles, and should not be disturbed on appeal.

My decision on Issue B makes it unnecessary for me to consider Issues C, D, and E.

ORDER:

I uphold the decision.


Tom Wright
Commissioner

October 31, 1991
Date



ORDER M - 6

**RE: THE HAMILTON-WENTWORTH REGIONAL
BOARD OF COMMISSIONERS OF POLICE**

APPEAL NUMBER M-910279



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O R D E R

BACKGROUND:

On June 21, 1991, a request was made by a News Director for a local television station to the Hamilton-Wentworth Regional Police for the names of the victims of an armed robbery alleged to have occurred that day, and the address where the incident occurred. Although the request was received by the Hamilton-Wentworth Regional Police, for the purposes of the Municipal Freedom of Information and Protection of Privacy Act, 1989, (the "Act"), the institution is the Hamilton-Wentworth Regional Board of Commissioners of Police.

The institution had earlier released the following information about the incident: the time of the incident, the vicinity, including a statement that it occurred at the home of the victims, the number and relationship of the victims, the type of crime, and the manner in which it occurred. The victims (the "affected persons") were members of the same family, and one of them has acted as spokesperson for the family. The spokesperson had specifically asked that the institution not release the names of the family members.

On July 9, 1991, the institution responded to the request, denying access to the requested information pursuant to sections 8 and 14 of the Act.

On July 16, 1991, the requester (the "appellant") appealed the decision of the institution. Notice of the appeal was sent to the appellant and the institution. The records containing the names of the victims and the address where the incident occurred were obtained and reviewed by the Appeals Officer. The records consist of occurrence reports, police officers' notebooks, and a statement requesting anonymity signed by the spokesperson, on behalf of the family.

In an attempt to settle the appeal, the Appeals Officer spoke with the institution and the appellant. The Appeals Officer attempted to contact the spokesperson, but that person refused to speak about the matter.

As attempts at settlement were unsuccessful, the matter proceeded to inquiry. A Notice of Inquiry was sent to the appellant, the institution and the affected persons. The Notice was accompanied by a report prepared by the Appeals Officer. The purpose of this report is to assist the parties in making their representations to this office concerning the subject matter of the appeal. The report outlines the facts of the appeal and sets out questions which paraphrase those sections of the Act which appear to be relevant to the appeal. It also indicates that the parties, in making their representations, need not limit themselves to the questions set out in the report.

Representations were received from the institution, the appellant, and the affected person acting as spokesperson. I have considered all of these representations in making this Order.

ISSUES:

The issues arising in this appeal are as follows:

- A. Whether the information contained in the requested records qualifies as "personal information", as defined in section 2(1) of the Act.
- B. If the answer to Issue A is yes, whether the mandatory exemption provided by section 14 of the Act applies.
- C. If the answer to Issue B is yes, whether there is a compelling public interest in disclosure of the records which clearly outweighs the purpose of the exemption.
- D. Whether the discretionary exemption provided by section 8 of the Act applies.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether the information contained in the requested records qualifies as "personal information", as defined in section 2(1) of the Act.

Section 2(1) of the Act states, in part:

"personal information" means recorded information about an identifiable individual, including,

- (d) the address, telephone number, fingerprints or blood type of the individual,
- (h) the individual's name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual.

In my view, the information at issue falls within the definition of personal information outlined in section 2(1). The names of the affected persons and the address where the offence occurred, which was, in this case, their residence address, are properly considered recorded information about the affected persons and constitute personal information as defined in the Act.

ISSUE B: If the answer to Issue A is yes, whether the mandatory exemption provided by section 14 of the Act applies.

Once it has been determined that a record or part of a record contains personal information, section 14(1) of the Act prohibits disclosure of this information except in certain circumstances. One such circumstance is contained in section 14(1)(f) of the Act, which states:

A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

- (f) if the disclosure does not constitute an unjustified invasion of personal privacy.

Sections 14(2) and (3) provide guidance in determining whether disclosure would result in an unjustified invasion of personal privacy. Section 14(3) lists the types of personal information the disclosure of which is presumed to constitute an unjustified invasion of personal privacy.

In this appeal, the institution specifically relied on the application of sections 14(3)(b) and (d) to raise the presumption that disclosure of the information at issue would constitute an unjustified invasion of personal privacy. Reliance was also placed on the criterion contained in section 14(2)(e).

Sections 14(3)(b) and (d) state:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,

- (b) was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;
- (d) relates to employment or educational history;

I will first address the application of section 14(3)(b). In this appeal, members of a police force investigated allegations that an offence under the Criminal Code of Canada had been committed. Accordingly, it is my view that the presumption contained in section 14(3)(b) applies, as the personal information of the affected persons was compiled by the police during their investigation.

However, I note that section 14(3)(b) contains the following exception: the presumption applies "except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation." In my view, the first part of the exception is directed to a situation existing after a charge is laid. In its representations, the institution addressed this point:

At the present time no arrests have been made in relation to this robbery. Therefore, at this point disclosure is not necessary to prosecute the violation. This investigation is still ongoing ... Later, once an arrest has been effected, disclosure will be necessary and this will be done by the Crown Attorney ...

With regard to the second part of the exception, the appellant submitted the following:

Disclosure may not be necessary to continue the investigation. However, it may be helpful. [The appellant's station and the institution] co-operate in the production of a weekly ... series which has resulted in the resolution of hundreds of crimes over the last six years. [The series] often results in arrests when viewers remember seeing or hearing something which aids investigators. In all instances, crime locations are identified in order to assist viewer memory.

Although it is arguable that disclosure of the personal information may assist in apprehensions, in the circumstances of this case, I am not convinced that disclosure is necessary for the continuation of the investigation. Therefore, the exception contained in section 14(3)(b) does not apply.

As I have determined that the requirements for a presumed unjustified invasion of personal privacy under section 14(3) have been satisfied, I must consider whether any other provisions of the Act come into play to rebut this presumption. Section 14(4) outlines a number of circumstances which, if they exist, could operate to rebut a presumption under section 14(3). In my view, the records do not contain any information that pertains to section 14(4), and therefore section 14(4) does not operate to rebut the presumed unjustified invasion of privacy under section 14(3).

I note that sections 14(2) and (3) are similar in wording to sections 21(2) and (3) of the provincial Freedom of Information and Protection of Privacy Act, 1987. Orders concerning those parts of section 21 issued under the provincial Act may therefore provide guidance in interpreting and applying the corresponding parts of section 14 of the municipal Act.

In Order 20, dated October 7, 1988, former Commissioner Sidney B. Linden stated that "... a combination of the circumstances set out in subsection 21(2) might be so compelling as to outweigh a presumption under subsection 21(3). However, in my view such a case would be extremely unusual."

Section 14(2) states:

A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,

- (a) the disclosure is desirable for the purpose of subjecting the activities of the institution to public scrutiny;
- (b) access to the personal information may promote public health and safety;
- (c) access to the personal information will promote informed choice in the purchase of goods and services;
- (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;
- (e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;
- (f) the personal information is highly sensitive;
- (g) the personal information is unlikely to be accurate or reliable;
- (h) the personal information has been supplied by the individual to whom the information relates in confidence; and
- (i) the disclosure may unfairly damage the reputation of any person referred to in the record.

In Order 99, dated October 3, 1989, Commissioner Linden discussed whether the list of criteria under section 21(2) of the provincial Act was exhaustive. He stated:

It should be pointed out that subsection 21(2) requires the head to consider all the relevant circumstances in determining whether disclosure of personal information constitutes an unjustified invasion of personal privacy. The subsection lists some of the criteria to be considered; however, the list is not exhaustive. By using the word "including" in its opening paragraph, I believe it requires the head to consider the circumstances of a case that do not fall under one or more of the listed criteria.

I agree with the reasoning of Commissioner Linden. The appellant has provided submissions which, although not fitting within the listed criteria, are relevant to the consideration of section 14(2). In his representations, the appellant stated:

Releasing the name and address of innocent victims is an invasion of privacy. However, it is wholly justified by the greater good that it serves. By reporting a robbery, the victims have launched a process which will lead to the release of their own identities, whether they like it or not. In order to prosecute this crime, the Canadian legal system will require the victims to testify, before the accused, in open court. At that time, their identity and the location of the crime will be known to all. It is an accepted and important part of our tradition that justice is carried out in the open. Innocent or not, like it or not, when a citizen becomes entangled in the legal system, he loses some privacy.

While I do not dispute the argument of the appellant, I believe its validity depends on the perpetrators having been apprehended and brought to trial. This has not happened here. Accordingly, I am of the view that this factor alone, at this point in time, does not rebut the presumption of an unjustified invasion of personal privacy provided by section 14(3)(b).

As I have found that the presumption of 14(3)(b) has not been rebutted, I do not need to consider the application of sections 14(3)(d) or 14(2)(e).

ISSUE C: If the answer to Issue B is yes, whether there is a compelling public interest in disclosure of the records which clearly outweighs the purpose of the exemption.

Section 16 states the following:

An exemption from disclosure of a record under sections 7, 9, 10, 11, 13 and 14 does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption. [Emphasis added.]

For this "public interest override" to apply, two requirements must be met:

- 1) there must be a compelling public interest in disclosure; and
- 2) this compelling public interest must clearly outweigh the purpose of the exemption.

In his submissions, the appellant stated:

The public has a right to know where crime is committed. And, it is important that citizens know who among them has been wronged. When the media reports a crime but fails to attach the faces of real people to it, the crime becomes a mere statistic. Viewers identify with people, not statistics.

The appellant also submitted that disclosure of personal information can mobilize the public:

There is a compelling public interest in disclosure. Crime is rampant in Canada yet many people are apathetic. Often the knowledge that a neighbour, colleague or friend has been victimized spurs people to action. Publicity about crimes in the past has caused groups to fight for stronger laws, to improve their own security, or to clean up their neighbourhoods.

In its submissions, the institution stated that the kind of information disclosed under its media release policy "... both protects and serves the general public interest by alerting the public at large of a problem in certain areas or types of criminal activities ... without [the institution] necessarily releasing the personal information of individuals." In the circumstances of this case, the institution submitted:

The following information was released to the media at the time of the offence:

- Owners of a Chinese restaurant were bound and robbed by four masked men when they arrived home with the day's receipts early in the morning of June 21, 1991.
- The restaurant owners, a husband and wife, arrived at their home in the Barton Street East and Kenora Avenue area at about 1:30 am.
- The husband went to the backyard where he was pounced on by two masked men, while two other suspects grabbed his wife.

- The weapons used were disclosed; three of the suspects had handguns and one of the suspects carried a knife.
- The couple were taken into the basement of their home, where their 10 year old son and the woman's mother were awakened. All four were bound and gagged with tape.
- The house was ransacked and cash from the restaurant and jewellery was taken by the thieves.

As well, it was released that there had been several similar incidents which have occurred in both Hamilton and Toronto. A warning to the public was issued to make them aware of these violent crimes.

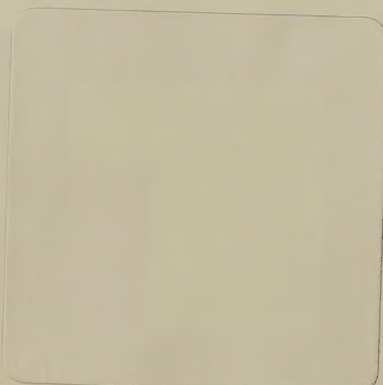
The institution added that the public is kept apprised by "the continual release of information as it relates to the progress made by this institution in its investigations."

I accept that there may be an element of public interest in the disclosure of the personal information of victims. However, in the circumstances of this appeal, I am not persuaded that this interest is a compelling one. In my opinion, the objectives advanced by the appellant have been met through the release of the information already disclosed by the institution, without the release of personal information.

In my view, even if I had concluded that there was a compelling public interest in disclosure of the personal information of the affected persons, I still must consider whether this compelling public interest "clearly outweighs" the purpose of the exemption provided by section 14. Section 16 requires me to balance the compelling public interest against the right of the affected persons to the protection of their individual privacy.

In this case, the affected persons expressed their wishes, orally and in writing, not to have their personal information disclosed. In his representations, the spokesperson for the affected persons indicated that he and his family are still upset and fearful as a result of the events which occurred. The institution stated that release of the personal information of the victims may "open them up to further attempts by the criminal element." The perpetrators of the crime have not as yet been apprehended. The institution indicated that "there is a reasonable expectation that some form of retaliation could occur."

In my view, any compelling public interest which might exist in this situation would not clearly outweigh the purpose of the exemption contained in section 14, which is the protection of the personal privacy of all individuals.



In closing, I wish to make it clear that I have based my conclusion on the particular circumstances of this appeal. I note that the institution has stated that "not all complainants have expressed these wishes for anonymity." Moreover, in appropriate circumstances "victims of crime have been identified in the past to the media by this institution and will continue [to be]."

As I have determined that disclosure of the information contained in the records in issue would result in an unjustified invasion of personal privacy as outlined in section 14, I need not consider Issue D.

ORDER:

I uphold the decision of the head.

Tom Wright
Tom Wright
Commissioner

December 19, 1991
Date

In addition, I also want to state that the results of the study are in line with the findings of other researchers who have shown that the use of a structured approach to problem solving can lead to more effective problem solving. This is particularly true in the case of complex problems where the use of a structured approach can help to break the problem down into smaller, more manageable parts. This is a key finding of the study and one that has important implications for the design of problem solving training programs.

As I have just stated, the results of the study are in line with the findings of other researchers who have shown that the use of a structured approach to problem solving can lead to more effective problem solving. This is particularly true in the case of complex problems where the use of a structured approach can help to break the problem down into smaller, more manageable parts. This is a key finding of the study and one that has important implications for the design of problem solving training programs.

The results of the study also suggest that the use of a structured approach to problem solving can lead to more effective problem solving. This is particularly true in the case of complex problems where the use of a structured approach can help to break the problem down into smaller, more manageable parts. This is a key finding of the study and one that has important implications for the design of problem solving training programs.



Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER M-42

Appeal M-9200144

Hamilton-Wentworth Regional Board of Commissioners of Police



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ORDER

BACKGROUND:

The Hamilton-Wentworth Regional Board of Commissioners of Police (the police) received the following request under the Municipal Freedom of Information and Protection of Privacy Act (the Act):

... all information on 90-086605-9, including officer's occurrence sheets, statements and/or information about me from Stelco's [named individual] also information from Stelco's [named individual] ...

The police advised the requester that disclosure of the records "may affect the interest of a third party." In accordance with section 21(1)(b) of the Act, the police notified five individuals of the request, and solicited their views as to whether the records should be disclosed.

Subsequently, the police informed the requester that access to the records was denied pursuant to sections 8(1)(e), 8(1)(l), 8(2)(a), 13, 14, 38(a) and 38(b) of the Act. The requester appealed the decision.

The requested records consist of a one-page "Offence Form" under the heading of "Threatening", three pages identified as "Supplementary" forms and a two-page statement, all of which are dated December 12, 1990.

Attempts to mediate this appeal were not successful. Accordingly, notice that an inquiry was being conducted to review the decision was sent to the appellant, the police, and the five persons who had been notified of the request by the police (the affected persons). Enclosed with each notice was an Appeals Officer's Report, intended to assist the parties in making representations concerning the subject matter of the appeal. Representations were received from the police and the affected persons.

ISSUES:

The issues arising in this appeal are as follows:

- A. Whether the information contained in the requested records qualifies as "personal information", as defined in section 2(1) of the Act.

- B. If the answer to Issue A is yes, whether the discretionary exemption provided by section 38(b) of the Act applies.
- C. Whether the records qualify for exemption under section 13 of the Act.
- D. Whether the records qualify for exemption under sections 8(1)(e) and/or (l) of the Act.
- E. Whether the records qualify for exemption under section 8(2)(a) of the Act.
- F. If the answer to Issues A, C, D, and/or E is yes, whether the discretionary exemption provided by section 38(a) of the Act applies.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether the information contained in the requested records qualifies as "personal information", as defined in section 2(1) of the Act.

Section 2(1) of the Act states, in part:

"personal information" means recorded information about an identifiable individual, including,

- (a) information relating to the race, national or ethnic origin, colour, religion, **age, sex, sexual orientation** or marital or family status of the individual,
- (b) information relating to the education or the medical, psychiatric, psychological, **criminal or employment history** of the individual or information relating to financial transactions in which the individual has been involved,
- ...
- (d) the **address, telephone number**, fingerprints or blood type of the individual,
- (e) the personal opinions or views of the individual except if they relate to another individual,
- ...

- (g) the views or opinions of another individual about the individual, and
- (h) the individual's name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

[Emphasis added.]

The records contain information relating to an offence the appellant is alleged to have committed, including the date of birth, sex, occupation, employment location, address, telephone number, and name of the appellant and the affected persons. The records also contain information relating to statements and/or allegations of complainants and witnesses. In my view, this information qualifies as the personal information of both the appellant and the affected persons.

ISSUE B: If the answer to Issue A is yes, whether the discretionary exemption provided by section 38(b) of the Act applies.

The police submit that section 38(b) applies to all of the information withheld from disclosure. Under Issue A, I found that the records contain the personal information of the appellant and the affected persons.

Section 36(1) of the Act gives individuals a general right of access to personal information about themselves, which is in the custody or under the control of the police. However, this right of access is not absolute; section 38 provides a number of exceptions to this general right of access to personal information by the person to whom it relates. Specifically, section 38(b) of the Act states:

A head may refuse to disclose to the individual to whom the information relates personal information,

if the disclosure would constitute an unjustified invasion of another individual's personal privacy;

Section 38(b) introduces a balancing principle. The police must look at the information and weigh the requester's right of access to his/her own personal information against another individual's right to the protection of their privacy. If the police determine that release of the information would constitute an unjustified invasion of the other individual's personal privacy, then section 38(b) gives the police the discretion to deny access to the personal information of the requester.

Sections 14(2) and (3) of the Act provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy of an individual other than the requester. Section 14(3) lists a series of circumstances which, if present, would raise the presumption of an unjustified invasion of personal privacy.

The police specifically rely on the application of sections 14(3)(b) and (d) to raise the presumption that disclosure of the information at issue would constitute an unjustified invasion of personal privacy. Sections 14(3)(b) and (d) of the Act read as follows:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,

- (b) was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;
- (d) relates to employment or educational history;

I have reviewed the circumstances under which the records at issue were created by or supplied to the police. I am satisfied that the personal information contained in the records at issue was compiled by a member of a police force and is identifiable as part of an investigation into a possible violation of law. Accordingly, the requirements for a presumed unjustified invasion of personal privacy under section 14(3)(b) have been satisfied.

I will now consider whether any other provisions of the Act come into play to rebut this presumption. In my view, the records do not contain any information that pertains to section 14(4), and therefore that section does not operate to rebut the presumed unjustified invasion of privacy under section 14(3).

In the context of section 21 of the provincial Freedom of Information and Protection of Privacy Act (the provincial Act), former Commissioner Sidney B. Linden considered the rebuttal of a presumed unjustified invasion of personal privacy. He stated that, "... a combination of the circumstances set out in section 21(2) might be so compelling as to outweigh a presumption under subsection 21(3). However, in my view, such a case would be extremely unusual". In my view, this statement also applies to section 14 of the municipal Act, which is similar in wording to section 21 of the provincial Act.

The appellant did not provide written representations in response to the "Notice of Inquiry". However, during a telephone conversation, he advised the Appeals Officer that he wished to rely on the information he provided during the processing of the appeal. In the appellant's letter of appeal, while he does not specifically refer to section 14(2)(d), he indicates that it may have relevance in this appeal as he may wish to pursue a civil action. Section 14(2)(d) states:

A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,

the personal information is relevant to a fair determination of rights affecting the person who made the request;

In Order P-312, Assistant Commissioner Tom Mitchinson, in discussing the provincial equivalent of section 14(2)(d), stated:

In my view, in order for section 21(2)(d) [section 14(2)(d) of the municipal Act] to be regarded as a relevant consideration, the appellant must establish that:

- (1) the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds; and
- (2) the right is related to a proceeding which is either existing or contemplated, not one which has already been completed; and
- (3) the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; and

- (4) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing.

For the purposes of this appeal, I accept that the appellant may bring a civil proceeding, and acknowledge that the personal information he is seeking access to may have some bearing on the determination of the right in question. However, I have not been provided with any information which indicates that the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing. Therefore, in the circumstances of this appeal, I feel that section 14(2)(d) is not a relevant consideration.

I have carefully considered the information at issue, the representations which have been provided, and the provisions of the Act which may operate to rebut the presumption of an unjustified invasion of personal privacy. Having done so, I find that the presumption contained in section 14(3)(b) is not rebutted. Therefore, it is not necessary for me to consider the application of section 14(3)(d).

In the circumstances, disclosure of the information at issue would constitute an unjustified invasion of the personal privacy of the affected persons and, therefore, the exemption under section 38(b) of the Act applies. Section 38(b) is a discretionary exemption. The police have provided representations regarding the exercise of discretion to refuse to disclose the information at issue and I find nothing to indicate that the exercise of discretion was improper.

My decision on Issue B makes it unnecessary for me to consider Issues C, D, E and F.

ORDER:

I uphold the decision to deny access to the records.

Original signed by: _____

Tom Wright
Commissioner

September 30, 1992



Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER M-62

Appeals M-9200101 and M-9200125

Hamilton-Wentworth Regional Police



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ORDER

On October 1, 1992, the undersigned was appointed Inquiry Officer and received a delegation of the power and duty to conduct inquiries and make orders under the provincial Freedom of Information and Protection of Privacy Act and the Municipal Freedom of Information and Protection of Privacy Act.

BACKGROUND:

The Hamilton-Wentworth Regional Police (the Police) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to records relating to criminal charges that had been laid by the Police against two named individuals.

The Police notified the two individuals of the request under section 21 of the Act and indicated to them that it was considering releasing some of the requested information. Both individuals objected to the release of any personal information that relates to them, and made representation to the Police as to why it should not disclose the information.

Following receipt of the representations from the two individuals, the Police decided to release to the requester certain information contained in the records.

The two individuals have appealed the Police's decision to grant access. The appeals were processed under two separate file numbers; however, since both decisions arose from the same request and the records at issue are virtually identical in both appeals, I have decided to dispose of them under one order.

Mediation was not successful and the matter proceeded to inquiry. Notice that an inquiry was being conducted to review the decision was sent to the Police, the two individuals (the appellants), and the original requester (the affected person). Representations were received from one of the appellants only. The Police and the affected person did not send any representations.

The information at issue in these appeals is contained in the records entitled "Case Envelope", "Instructions for Crown Counsel", "Court Information", and in two police officers' notebooks.

ISSUES:

- A. Whether the information contained in the record qualifies as "personal information" as defined in section 2(1) of the Act.
- B. If the answer to Issue A is yes, whether the mandatory exemption provided by section 14 of the Act applies.

DISCUSSION:

ISSUE A: Whether the information contained in the record qualifies as "personal information", as defined in section 2(1) of the Act.

In all cases where the request involves access to personal information, it is my responsibility to ensure that the information in question falls within the definition of "personal information" as set out in section 2(1) of the Act and to determine whether this information relates to the appellant, another individual or both.

Section 2(1) of the Act states, in part:

"personal information" means recorded information about an identifiable individual, including,

- (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
...
- (d) the address, telephone number, fingerprints or blood type of the individual,
...
- (h) the individual's name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

The information contained in the records at issue in these appeals falls within one or more of the aforementioned definitions of personal information, and relates only to the appellants.

ISSUE B. If the answer to Issue A is yes, whether the mandatory exemption provided by section 14 of the Act applies.

Once it has been determined that a record contains personal information, section 14 of the Act prohibits the disclosure of this information, except in certain circumstances. Specifically, section 14(1)(f) of the Act states:

A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

if the disclosure does not constitute an unjustified invasion of personal privacy.

Subsections 14(2) and (3) of the Act provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy of an individual other than the requester. Section 14(3) lists the types of information the disclosure of which is presumed to constitute an unjustified invasion of personal privacy.

One of the appellants has submitted that section 14(3)(b) of the Act applies. This section states:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,

was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;

I have reviewed the records and I am satisfied that the personal information contained in the records was compiled and is identifiable as part of an investigation into a possible violation of law by the appellants, and I find that the requirements for a presumed unjustified invasion of the personal privacy of the appellants under section 14(3)(b) have been satisfied.

Once it has been determined that the requirements for a presumed unjustified invasion of personal privacy under section 14(3) have been established, I must consider whether any other provisions of the Act come into play to rebut this presumption.

Section 14(4) outlines a number of circumstances which, if they exist, could operate to rebut a presumption under section 14(3). In my view, the records at issue in this appeal do not contain information relevant to section 14(4).

Section 14(2) of the Act provides some criteria to be considered in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy. A combination of listed and/or unlisted factors weighing in favour of disclosure might be so compelling as to outweigh a presumption under section 14(3); however, such a case would be extremely unusual.

I have not received any representations from the affected person or the Police regarding the relevance of any factors which would support the disclosure of the information. The Police has not provided me with any reasons as to why the information should be disclosed.

In my view, the presumption raised by section 14(3)(b) of the Act has not been rebutted. Accordingly, I find that the disclosure of the records at issue would constitute an unjustified invasion of the personal privacy of the appellants.

As indicated above, section 14 is a mandatory exemption which requires institutions covered under the Act to deny access to personal information that relates to other individuals, unless one or more of the specific exceptions listed under the section apply to the circumstances of the case. I have not been provided with any evidence that any of the exceptions apply in the circumstances of these appeals. I have found that disclosure of the information would constitute an unjustified invasion of the personal privacy of the appellants; accordingly, the information should not be disclosed.

ORDER:

I order the Police not to disclose the records in these two appeals.

Original signed by: _____

Asfaw Seife
Inquiry Officer

November 10, 1992

JUN 13 1995

Commissioner/Ontario

Commissaire à l'information
et à la protection de la vie privée/Ontario

GOVERNMENT DOCUMENTS

ORDER M-332

Appeal M-9400098

Hamilton-Wentworth Regional Police Services Board



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ORDER

NATURE OF THE APPEAL:

This is an appeal under the Municipal Freedom of Information and Protection of Privacy Act (the Act). The appellant has requested a copy of records from the Hamilton-Wentworth Regional Police Services Board (the Police) which would confirm whether or not he is the subject of a police investigation. The appellant is particularly interested in determining whether or not he is under surveillance by the Police. The Police refused to confirm or deny the existence of any record which would be responsive to this request pursuant to section 8(3) of the Act.

A notice of inquiry was provided to the appellant and the Police. Representations were received from both parties.

DISCUSSION:

LAW ENFORCEMENT - REFUSAL TO CONFIRM OR DENY

The Police state that they are relying on section 8(3) of the Act to refuse to confirm or deny the existence of records responsive to the request. This section provides that:

A head may refuse to confirm or deny the existence of a record to which subsection (1) or (2) applies.

In relying on section 8(3) of the Act, the Police must do more than merely indicate that records of the nature requested, if they exist, would qualify for exemption under sections 8(1) or (2). In addition, the Police must establish that disclosure of the existence or non-existence of such a record would communicate to the appellant information that would fall under either section 8(1) or (2) of the Act (Order P-542).

The Police submit that, if records of the nature requested exist, they would qualify for exemption under sections 8(1)(a) and 8(2)(a). Section 8(1)(a) provides that:

A head may refuse to disclose a record if the disclosure could reasonably be expected to,

interfere with a law enforcement matter;

Section 8(2)(a) states that:

A head may refuse to disclose a record,

that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law;

In order for records of the type requested, if they exist, to qualify for exemption under these sections, the matter which would generate the records must satisfy the definition of the term "law enforcement" as found in section 2(1) of the Act. This provision reads:

"law enforcement" means,

- (a) policing,
- (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, and
- (c) the conduct of proceedings referred to in clause (b);

The purpose of the exemption contained in section 8(1)(a) is to provide the Police with the discretion to preclude access to records in circumstances where disclosure of the records could reasonably be expected to interfere with an ongoing law enforcement matter. The Police bear the onus of providing sufficient evidence to substantiate the reasonableness of the expected harm, and, in my view, the Police discharge this onus by establishing a clear and direct linkage between the disclosure of the specific information and the harm alleged (Orders P-534 and P-542).

The Police submit that records of the nature requested, if they exist, would relate to the use of surveillance by the Police in their investigation into a violation of law which may result in criminal proceedings being instituted against an individual(s). The Police further provide evidence as to how the disclosure of such records would interfere with this type of law enforcement matter.

Having reviewed the representations of the Police, I am satisfied that records of the type requested, if they exist, would relate to a law enforcement matter, as that term is defined in section 2(1) of the Act. I am also satisfied that disclosure of records of the type requested, if they exist, could reasonably be expected to interfere with a law enforcement matter as contemplated by section 8(1)(a) of the Act. Accordingly, I find that records of the type requested, if they exist, would qualify for exemption under section 8(1)(a) of the Act.

I further find that confirmation of the existence or non-existence of records responsive to this request would communicate to the appellant information which would fall under section 8(1)(a) of the Act. Accordingly, section 8(3) of the Act is applicable to the information requested.

ORDER:

I uphold the decision of the Police.

Original signed by: _____

Laurel Cropley
Inquiry Officer

_____ June 15, 1994

THE FIRST PART OF THE BOOK IS A HISTORY OF THE
CITY OF NEW YORK FROM ITS FOUNDATION TO THE
PRESENT TIME. IT IS A HISTORY OF THE CITY
AS IT IS, AND NOT AS IT WOULD BE IF IT
WERE A CITY OF THE FUTURE.

THE HISTORY OF THE CITY OF NEW YORK

BOOK I

THE HISTORY OF THE CITY OF NEW YORK
FROM ITS FOUNDATION TO THE
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THE HISTORY OF THE CITY OF NEW YORK

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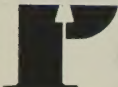
THE HISTORY OF THE CITY OF NEW YORK
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PRESENT TIME.

URBAN/MUNICIPAL

CA2 ON IP

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1995

 Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

URBAN MUNICIPAL

JUN 17 1996

GOVERNMENT DOCUMENTS

ORDER M-595

Appeal M-9500075

Hamilton-Wentworth Regional Police Services Board



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NATURE OF THE APPEAL:

This is an appeal under the Municipal Freedom of Information and Protection of Privacy Act (the Act). The Hamilton-Wentworth Regional Police Services Board (the Police) received a request for access to its files relating to a murder investigation. The requester is counsel to an insurance company which has denied a claim for death benefits by the widow of the murder victim. The Police located a large number of records responsive to the request and denied access to them based on the following exemptions contained in the Act:

- law enforcement - sections 8(1)(a) and (b), 8(2)(a)
- right to a fair trial - section 8(1)(f)
- invasion of privacy - section 21(1)

The requester appealed the Police decision to deny access to the records. A Notice of Inquiry was provided to the appellant and the Police. Representations were received from both parties.

The records at issue in this appeal consist of 9009 pages of documents, 517 photographs, 7 videotapes and 94 audio cassettes. The Police submit that an additional 6284 pages are comprised of records which fall outside the scope of the Act and are, accordingly, not at issue in this appeal.

I have examined the relevant provisions of the Criminal Code and a description of the records themselves. In a previous order, Assistant Commissioner Tom Mitchinson found that the doctrine of federal legislative paramountcy operates so as to exclude requests for records of this type from the scope of the Act. Assistant Commissioner Mitchinson came to the conclusion that, while the Code and the Act were not expressly contradictory on every count, they were nonetheless operationally incompatible with one another. I agree. Accordingly, I find that these 6284 pages of records fall outside the scope of the Act.

DISCUSSION:

INVASION OF PRIVACY

The Act defines personal information, in part, as recorded information about an identifiable individual. Having reviewed the records and the representations of the parties, I find that all of the records, with the exception of the photographs of firearms found in Box 1A File 36, media releases and press clippings in Box 1A File 38 and the weather documents contained in Box 4, contain the personal information of the deceased and various other identifiable individuals, including witnesses and suspects in the murder investigation. Further, I find that none of the records contain any personal information of the appellant or his client.

Section 14(1) of the Act prohibits the disclosure of personal information to any person other than to the individual to whom the information relates, except in certain circumstances listed under the section.

In my view, the only exception to the section 14(1) mandatory exemption which has potential application in the circumstances of this appeal is section 14(1)(f), which reads as follows:

A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

if the disclosure does not constitute an unjustified invasion of personal privacy.

Because section 14(1)(f) is an exception to the mandatory exemption which prohibits the disclosure of personal information, in order for me to find that section 14(1)(f) applies, I must find that disclosure of the personal information would **not** constitute an unjustified invasion of personal privacy.

Sections 14(2) and (3) of the Act provide guidance in determining whether or not disclosure of personal information would result in an unjustified invasion of personal privacy. Section 14(3) lists the types of information, the disclosure of which is presumed to constitute an unjustified invasion of personal privacy. The Police submit that the presumption contained in section 14(3)(b) applies to all of the records at issue. This section states:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,

was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;

I have reviewed the records at issue and the representations of the parties and, in my view, the presumption in section 14(3)(b) applies to the personal information contained in the records. This information was compiled and is identifiable as part of an investigation into a possible violation of law, namely the Criminal Code. Where one of the presumptions found in section 14(3) applies to the personal information found in the records, the only way such a presumption against disclosure can be overcome is where the personal information falls under section 14(4) or where a finding is made that section 16 of the Act applies to the personal information. I find that sections 14(4) and 16 have no application in the circumstances of this appeal.

Accordingly, I find that all of the records at issue in this appeal, with the exception of the records enumerated above which do not contain personal information, are exempt from disclosure under section 14 of the Act.

LAW ENFORCEMENT

The records which are not exempt under section 14 of the Act consist of a seven page weather report, a document which interprets the data on the report, photographs of weapons, media releases from the Police and seven newspaper clippings relating to the murder, the investigation and the conviction of one of the accused persons.

Sections 8(1)(a) and (b) state that:

A head may refuse to disclose a record if the disclosure could reasonably be expected to,

- (a) interfere with a law enforcement matter;
- (b) interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;

In order for a record to qualify for exemption under sections 8(1)(a) or (b), the matter to which the record relates must first satisfy the definition of the term "law enforcement" found in section 2(1) of the Act.

The weather reports were prepared by Environment Canada and describe the weather conditions in Hamilton on the night of the murder. I find that records of this type do not qualify as "law enforcement" records within the meaning of the Act. Accordingly, their disclosure could not reasonably be expected to interfere with a law enforcement matter or investigation as contemplated by sections 8(1)(a) and (b).

The Police have not made any specific representations as to how the disclosure of the weapons photographs could interfere either with a law enforcement matter or an investigation. Nor have any representations been made concerning the application of these exemptions to the media releases and press clippings. In my view, it is unreasonable to expect that a law enforcement matter or investigation could be interfered with should these records be disclosed. Accordingly, they are not exempt from disclosure under sections 8(1)(a) or (b) of the Act.

The Police have also claimed the application of section 8(2)(a) to these records. In order for a record to qualify for exemption under this section, the matter to which the record relates must also first satisfy the definition of the term "law enforcement" found in section 2(1) of the Act.

In addition, for a record to qualify for exemption under sections 8(2)(a) of the Act, the Police must satisfy each part of the following three part test:

1. the record must be a report; **and**
2. the report must have been prepared in the course of law enforcement, inspections or investigations; **and**
3. the report must have been prepared by an agency which has the function of enforcing and regulating compliance with a law.

I have found above that the weather information records do not qualify as "law enforcement" records for the purposes of the Act. In addition, the weather reports were not prepared in the course of a law enforcement investigation or inspection. Rather, they were prepared by Environment Canada, which is not an agency which has the function of enforcing and regulating compliance with a law. Accordingly, section 8(2)(a) does not apply to these records.

The weapons photographs, media releases and press clippings cannot be characterized as reports within the meaning of the Act. Accordingly, section 8(2)(a) has no application to these records.

RIGHT TO A FAIR TRIAL

Section 8(1)(f) states:

A head may refuse to disclose a record if the disclosure could reasonably be expected to,

deprive a person of the right to a fair trial or impartial adjudication;

The Police have not provided any specific representations as to how the disclosure of the information contained in these records might reasonably be expected to deprive a person of a right to a fair trial. I find, therefore, that section 8(1)(f) of the Act has no application to them.

As no other exemptions have been claimed for the weather information, the weapons photographs, the media releases and the press clippings, they should be disclosed to the appellant.

ORDER:

1. I order the Police to disclose the weather information found in Box 4, the weapons photographs found in Box 1A File 36 and the media releases and press clippings found in Box 1A File 38 to the appellant within twenty-one (21) days of the date of this order.
2. I uphold the decision of the Police to deny access to the remaining records.

3. In order to verify compliance with this order, I reserve the right to require the Police to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 1.



Original signed by:

Donald Hale

Inquiry Officer

September 22, 1995

URBAN/MUNICIPAL

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URBAN MUNICIPAL

SEP 28 1997

Commissaire à l'information
et à la protection de la vie privée/Ontario

GOVERNMENT DOCUMENTS

ORDER M-682

Appeal M-9500574

Hamilton-Wentworth Regional Police Services Board



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NATURE OF THE APPEAL:

This is an appeal under the Municipal Freedom of Information and Protection of Privacy Act (the Act). The Hamilton-Wentworth Regional Police Services Board (the Police) received a request for a copy of a specified police incident report regarding allegations of possible fraud involving a public sector organization (the public body). The requester is an individual who had contact with the Police during the fraud investigation.

The Police located seven records which were responsive to the request. After obtaining the consent of one individual identified in some of the records, the Police disclosed some records to the requester and denied access to others, in whole or in part, relying on the following exemptions contained in the Act:

- law enforcement - section 8(2)(a)
- invasion of privacy - section 38(b)
- discretion to refuse requester's own information - section 38(a)

The responsive records are described as follows:

- | | | |
|----------|---|--|
| Record 1 | - | one-page Occurrence Report - page 001 - access in full |
| Record 2 | - | four-page Supplementary Occurrence Report - pages 002-005 - partial access |
| Record 3 | - | two-page anonymous letter to public body - pages 006-007 - deny access in full |
| Record 4 | - | one-page letter to Regional Chairman - page 008 - access in full |
| Record 5 | - | one-page letter from Regional Chairman to Police - page 009 - access in full |
| Record 6 | - | one-page internal memorandum from one public body employee to another - page 010 - deny access in full |
| Record 7 | - | one-page Supplementary Occurrence Report - page 011 - partial access |

The requester appealed this decision, and also claimed that further responsive records should exist. During mediation of the appeal, an additional portion of Record 2, and Record 3 in its entirety were disclosed to the appellant. The scope of the appellant's request was clarified to include the police incident report and any Regional Council minutes and invoices relating to a specified purchase made by the public body. No additional responsive records were located by the Police.

The records which remain at issue in this appeal are the remaining portions of Record 2 (pages 003 and 005) and Record 7, and Record 6 in its entirety.

A Notice of Inquiry was provided to the appellant, the Police and an individual whose interests may be affected by the disclosure of the information contained in the records (the affected person). Representations were received from the Police and the affected person.

DISCUSSION:

INVASION OF PRIVACY

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual.

I have reviewed the three remaining records, and I find that all of them contain information which satisfies the definition of personal information. In my view, Record 2 contains the personal information of the appellant, another identifiable individual, and the affected person, which was gathered by the Police in the context of the fraud investigation. Although Record 6 is an internal memorandum prepared in the employment context, it concerns individuals who were directly connected with the fraud investigation, and for that reason I find that it contains the personal information of the affected person and another identifiable individual. Record 7 contains the personal information of the same individuals included in Record 6.

Section 36(1) of the Act gives individuals a general right of access to their own personal information held by the Police, subject to a number of exceptions to this general right of access contained in that section. One such exception is section 38(b) which gives the Police discretion to deny access if disclosure would constitute an unjustified invasion of another individual's personal privacy. These sections are relevant to my determination of the proper treatment of Record 2, which includes the personal information of the appellant and other individuals.

Section 14(1) is a mandatory exemption which prohibits the disclosure of personal information to anyone other than the individual to whom the information relates, subject to a number of exceptions contained in that section. Although section 14(1) was not raised by the Police, because it is a mandatory exemption, I will determine whether this exemption applies to Records 6 and 7, which contain the personal information of individuals other than the appellant.

Sections 14(2), (3) and (4) of the Act provide guidance in determining whether the disclosure of personal information would constitute an unjustified invasion of personal privacy. These sections are relevant to a determination under both sections 38(b) and 14(1). Where one of the presumptions found in section 14(3) applies to the personal information found in a record, the only way such a presumption can be overcome is if the personal information at issue falls under section 14(4) of the Act or where a finding is that section 16 of the Act applies to the personal information.

In Order M-444, Inquiry Officer John Higgins found that non-disclosure of information which had been provided to a police force by an appellant in the first place would contradict one of the primary purposes of the Act, namely the right of access to one's own personal information. A finding such as this could not be supported unless there was a compelling reason for non-disclosure. In this case, the undisclosed personal information of the affected person found on page 005 of Record 2 was provided to the Police by the appellant. Applying the reasoning articulated by Inquiry Officer Higgins, I find that disclosure of the information which was provided by the appellant to the Police would not constitute an unjustified invasion of the personal privacy of the affected person. Therefore, section 38(b) does not apply to the undisclosed portions on page 005 of Record 2.

The Police submit that the information contained in the records was compiled as part of an investigation into a possible violation of law, specifically the Criminal Code, and, therefore, disclosure would result in a presumed unjustified invasion of personal privacy under section 14(3)(b) of the Act. The representations provided by the affected person support this position.

Having reviewed the representations and the records, I have made the following findings:

1. Records 2, 6 and 7 contain information which was compiled as part of an investigation into a possible violation of law under the Criminal Code and, therefore, disclosure of the personal information contained on page 003 of Record 2, Record 6, and the remaining portion of Record 7 would constitute a presumed unjustified invasion of privacy of the affected person and other identifiable individuals under section 14(3)(b) of the Act.
2. None of the personal information contained in these records falls under section 14(4) and the appellant has not raised the possible application of section 16 of the Act.
3. I find that disclosure of the remaining portions of page 003 of Record 2 would constitute an unjustified invasion of the personal privacy of an identifiable individual pursuant to section 38(b) of the Act.
4. I find that disclosure of Record 6 in its entirety and the remaining portion of Record 7 would constitute an unjustified invasion of the personal privacy of the affected person and another identifiable individual pursuant to section 14(1) of the Act.

LAW ENFORCEMENT

As a result of my findings under sections 38(b) and 14(1), only the undisclosed portions of page 005 of Record 2 remain at issue and will be discussed in the context of the law enforcement exemption.

I have determined that Record 2 contains the personal information of the appellant. Under section 38(a) of the Act, the Police have discretion to refuse to disclose this information to the appellant if the law enforcement exemption provided by section 8 of the Act applies. The Police submit that Record 2 qualifies for exemption under section 8(2)(a), which reads as follows:

A head may refuse to disclose a record,

that is a report prepared in the course of law enforcement,
inspections or investigations by an agency which has the function
of enforcing and regulating compliance with a law;

Record 2 is a Supplementary Occurrence Report prepared by the Police during the course of an investigation into a possible violation of the Criminal Code, which clearly qualifies as a law enforcement matter within the meaning of section 2(1) of the Act.

In order to qualify for exemption under section 8(2)(a) the Police must establish that the record at issue is a "report".

The word "report" is not defined in the Act. Based on previous orders, however, for a record to be a report, it must consist of a formal statement or account of the results of the collation and consideration of information. Generally speaking, results would not include mere observations or recordings of fact (Order 200).

Having reviewed Record 2 and the representations submitted by the Police, I find that it consists of an outline of the steps taken by the investigating officer during the course of the fraud investigation. In my view, the information contained in this record is mere observations and recordings of fact and is not a formal statement or account of the results of the investigation. Therefore, I find that Record 2 does not qualify as a "report", and the undisclosed portions of this record do not satisfy the requirements for exemption under section 8(2)(a). Therefore, the undisclosed portions of page 005 of Record 2 do not qualify for exemption under section 38(a) of the Act and should be disclosed to the appellant.

REASONABLENESS OF SEARCH

Where a requester provides sufficient details about the records which she is seeking and the Police indicate that further records do not exist, it is my responsibility to ensure that the Police have made a reasonable search to identify any records which are responsive to the request. The Act does not require the Police to prove with absolute certainty that further records do not exist. However, in my view, in order to properly discharge its obligations under the Act, the Police must provide me with sufficient evidence to show that they have made a **reasonable** effort to identify and locate records responsive to the request.

In this case, the request was for a specified police incident report. As a result of mediation efforts, the scope of the request was clarified in the Notice of Inquiry to include this report and any Regional Council minutes and invoices relating to a specified purchase made by the public body which was the subject matter of the fraud investigation.

In their representations, the Police describe the steps taken by them to identify all responsive records. This included a review of the file and speaking with the police officer who investigated the complaint. The Police also indicate that the appellant was contacted during the processing of the request to insure that all responsive records were identified. The Police submit that all reasonable steps to locate responsive records have been taken and that no further responsive records exist with respect to this request.

Having reviewed the representations of the Police, I am satisfied that the efforts made by the Police to determine whether they might have further records responsive to this request were reasonable in the circumstances.

ORDER:

1. I order the Police to disclose page 005 of Record 2 to the appellant by **February 9, 1996** but not before **February 5, 1996**.
2. I uphold the decision of the Police not to disclose Record 6 in its entirety, and the undisclosed portions of Record 2 and Record 7.
3. In order to verify compliance with the provisions of this order, I reserve the right to require the Police to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 1.

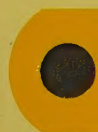


Original signed by: _____

Tom Mitchinson

Assistant Commissioner

January 5, 1996

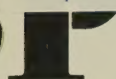


URBAN/MUNICIPAL

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Commissioner/Ontario

Commissaire à l'information

et à la protection de la vie privée/Ontario

URBAN MUNICIPAL

JUN 17 1996

GOVERNMENT DOCUMENTS

ORDER M-620

Appeal M-9500105

Regional Municipality of Hamilton-Wentworth



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NATURE OF THE APPEAL:

This is an appeal under the Municipal Freedom of Information and Protection of Privacy Act (the Act). The Regional Municipality of Hamilton-Wentworth (the Municipality) received a request from an individual for access to all welfare information and records relating to him. He subsequently narrowed the scope of the request to include only case management summary reports.

The Municipality granted the requester partial access to the reports, but denied access to the balance of the information on the basis of the following exemptions under the Act:

- law enforcement - sections 8(1)(c), (d) and 8(2)(a)
- invasion of privacy - sections 14 and 38(b)
- discretion to refuse requester's own information - section 38(a)
- evaluative or opinion material - section 38(c)

The requester appealed.

A Notice of Inquiry was sent to the Municipality and the appellant. Representations were received from the Municipality only.

In its submissions, the Municipality agreed to disclose to the appellant pages 2, 10, 13, 14, 15, 20, 22, 46, 47, 51, 54, 73, 83, 95 and 99 in their entirety and portions of pages 48 and 87. These pages should be provided to the appellant by the Municipality if it has not already done so.

Therefore, the records at issue in this appeal consist of portions of pages 5, 8, 9, 16, 21, 48, 65, 66, 68, 70, 72, 74, 81, 84, 85, 87 and 101, and pages 76-78, 80, 82, 86 and 88-94 in their entirety.

The Municipality also indicated in its submissions that it would no longer be claiming the application of section 8(1)(c) of the Act. As this is a discretionary exemption, I will not consider it in this order.

DISCUSSION:

DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION/LAW ENFORCEMENT

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual, including any identifying number assigned to the individual and the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual.

I have reviewed the pages at issue to determine if they contain personal information and, if so, to whom that personal information relates. The pages all consist of notes taken by individuals in the Municipality's social services department concerning the appellant's claims for social assistance.

I find that this constitutes the personal information of the appellant. In addition, with the exception of pages 65 and 68, all of the pages contain the personal information of other identifiable individuals. Pages 65 and 68 contain only the personal information of the appellant.

Section 36(1) of the Act gives individuals a general right of access to their own personal information held by a government body. Section 38 provides a number of exceptions to this general right of access.

Under section 38(a) of the Act, the Municipality has the discretion to deny access to an individual's own personal information in instances where certain exemptions would otherwise apply to that information. The exemptions listed in section 38(a) include the law enforcement exemption provided by section 8. The Municipality claims that portions of pages 65, 68, 70, 81 and page 82 in its entirety are exempt under section 8(1)(d) which states:

A head may refuse to disclose a record if the disclosure could reasonably be expected to,

disclose the identity of a confidential source of information in respect of a law enforcement matter, or disclose information furnished only by the confidential source

Deciding whether a record qualifies for exemption under this section is a preliminary step in determining whether the exemption in section 38(a) applies.

In order for a record to qualify for exemption under section 8(1)(d), the matter to which the record relates must first satisfy the definition of "law enforcement" found in section 2(1) of the Act.

"Law enforcement" is defined in section 2(1) of the Act as:

- (a) policing;
- (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings; and
- (c) the conduct of proceedings referred to in clause (b).

The Municipality maintains that the pages at issue under section 8(1)(d) relate to an investigation conducted by an Eligibility Review Officer (ERO) regarding the appellant's right to certain social welfare benefits. As a result of such an investigation, sanctions may be imposed in the form of an assessment of overpayment or the withholding of benefits. These decisions are reviewable by the

Social Assistance Review Board which may also impose sanctions. In these circumstances, I find that the information at issue under section 8(1)(d) relates to a law enforcement matter.

The information contained in the pages for which this exemption has been claimed identifies various individuals contacted by the ERO and the information provided by them, which formed part of the ERO's case. The Municipality states that these individuals supplied information about the appellant without his knowledge and with an expectation of confidentiality. The Municipality indicates that even prior to the coming into force of the Act, its policy was to protect the privacy of such individuals.

Based on the submissions of the Municipality, I find that disclosure of portions of pages 65, 68, 70, 71 and page 82 in its entirety could reasonably be expected to disclose the identity of the confidential sources contacted by the ERO and thus this information qualifies for exemption under section 8(1)(d) of the Act.

Having found that these pages contain the personal information of the appellant and qualify for exemption under section 8(1)(d), I find that they are exempt from disclosure under section 38(a).

INVASION OF PRIVACY

Section 38(b) of the Act is another exemption to an individual's general right of access to his or her own personal information. This section provides that a head of an institution may refuse such disclosure if to do so would constitute an unjustified invasion of another individual's personal privacy. As I have previously indicated, all of the remaining pages at issue contain the personal information of both the appellant and other individuals.

Sections 14(2), (3) and (4) of the Act provide guidance in determining whether the disclosure of personal information would constitute an unjustified invasion of personal privacy. Where one of the presumptions found in section 14(3) applies to the personal information found in a record, the only way such a presumption may be overcome is where the personal information falls under section 14(4) or where a finding is made that section 16 of the Act applies to the personal information.

If none of the presumptions contained in section 14(3) apply, the institution must consider the application of the factors listed in section 14(2) of the Act, as well as all other considerations that are relevant in the circumstances of the case.

The Municipality submits that certain of the personal information of the other individuals relates to their medical history or diagnosis, eligibility for social service benefits, and/or describes their finances (sections 14(3)(a), (c), and (f) of the Act respectively). In addition, the Municipality claims that some of this personal information is highly sensitive (section 14(2)(f)). I agree with the Municipality's characterizations of this information.

The appellant has provided no submissions in this matter. Accordingly, there is no argument before me that section 14(4) or 16 applies to rebut the presumptions claimed. Nor have I been presented with any evidence which weighs in favour of disclosing this information.

Having considered all the circumstances of this case, including material provided by the Municipality on its exercise of discretion under section 38(b), I find that to disclose the pages at issue would constitute an unjustified invasion of the personal privacy of individuals other than the appellant. Therefore, the exemption in section 38(b) applies.

Because of the manner in which I have addressed these issues, I need not consider the application of the other exemptions claimed by the Municipality.

ORDER:

1. I order the Municipality to disclose to the appellant within fifteen (15) days of the date of this order pages 2, 10, 13, 14, 15, 20, 22, 46, 47, 51, 54, 73, 83, 95 and 99 in their entirety and the portions of pages 48 and 87 which it has identified on the copy of these pages included with its submissions to this office.
2. I uphold the decision of the Municipality not to disclose the balance of the pages.

Original signed by: _____

Anita Fineberg
Inquiry Officer

October 18, 1995

The present situation is a result of the historical process of the development of the country. It is a process which has been going on for a long time and it is not likely to be reversed in the near future.

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Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER M-493

Appeal M-9400629

Board of Education for the City of Hamilton



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NATURE OF THE APPEAL:

This is an appeal under the Municipal Freedom of Information and Protection of Privacy Act (the Act). The appellant submitted a multi-part request to the Board of Education for the City of Hamilton (the Board).

The part of the request which is at issue in this appeal was for access to a complete list of probationary secondary school teachers hired over the last seven years, including information about whether any of these teachers are related to certain Board members and staff.

At the request stage, the Board did not grant access to any records. It indicated that the requested information could be extracted from Board minutes, and directed the appellant to possible sources for these minutes. The Board's response did not state that access to these minutes was denied, nor was an exemption claimed. After receiving this response, the appellant filed an appeal with the Commissioner's office on the basis that the Board ought to have responsive records.

During the mediation stage of this appeal, the Board conducted several additional searches for records. As a result of these efforts, lists of probationary teachers for the years 1992, 1993 and 1994 were located and disclosed to the appellant. These records contained not only the teachers' names, but also the locations to which they were assigned, the nature of the assignment, the date of probationary appointment and the permanent appointment date.

The names of the teachers in these three records were withheld from disclosure pursuant to the exemption relating to personal privacy provided by section 14(1) of the Act. The appellant has chosen not to contest the Board's decision to deny access to the teachers' names and accordingly, that is not an issue in this appeal. Information relating to primary and other non-secondary school teachers was also not disclosed because the request referred to secondary school teachers.

During mediation, the appellant agreed that the relevant part of the request should be interpreted as a request for **lists of probationary secondary school teachers**. Accordingly, neither the Board minutes referred to above, nor the parts of the lists of probationary teachers which pertain to non-secondary school teachers, are at issue in this appeal. The only substantive issue to be considered is whether the Board's search for responsive records was reasonable in the circumstances.

A Notice of Inquiry was provided to the Board and the appellant. Representations were received from both parties. The Board's representations sought to characterize the request as not being a proper one under the Act. I will consider this as a preliminary issue.

PRELIMINARY ISSUE:

FORM OF THE REQUEST

The Board's representations state that the request "... was not a proper one under the [Act]. The request sought the answers to questions rather than access to existing records for the most

part". The Board did not go on to argue that, on this basis, I have no jurisdiction to consider this appeal. However, since in my view this submission could be seen to have jurisdictional implications, I will consider it as a preliminary issue.

First, I do not agree with the Board's characterization of the request as being, for the most part, in the form of questions. For example, the part of the request which is under consideration in this appeal (which is, arguably, the only part of the request which I need to consider in determining this issue) states, in part, as follows:

[W]e are interested in a complete list of secondary teachers hired for the first time, full time (first contract probationary) over the last seven years ...

In my view, this is clearly a request for particular records, and is not in the form of a question. On this basis alone, I would be justified in rejecting this submission.

However, even if I agreed with the Board that the request is, for the most part, in the form of questions, I would not agree that, on this basis, the request is not a proper one under the Act. The Board has not provided any authority to substantiate this argument. Moreover, it would be contrary to the spirit of the Act to exclude a request on such a technical basis.

In my view, when such a request is received, the Board is obliged to consider what records in its possession might, in whole or in part, contain information which would answer the questions asked. Under section 17 of the Act, if the request is not sufficiently particular "... to enable an experienced employee of the institution, upon a reasonable effort, to identify the record", then the Board may have recourse to the clarification provisions of section 17(2).

Accordingly, I find that the request was a proper one under the Act, and I have jurisdiction to consider this appeal.

In a related submission, the Board argues that it is not obliged to create responsive records. I agree with this view, but, as noted above, this does not relieve the Board of the responsibility to determine whether its existing records contain responsive information.

DISCUSSION:

REASONABLENESS OF SEARCH

Where a requester provides sufficient details about the records which he or she is seeking and the Board indicates that additional records do not exist, it is my responsibility to ensure that the Board has made a reasonable search to identify responsive records. While the Act does not require that the Board prove to the degree of absolute certainty that such records do not exist, the search which the Board undertakes must be conducted by knowledgeable staff in locations where the records in question might reasonably be located.

As part of its representations, the Board has provided the affidavit of its Records Analyst. This affidavit describes the efforts made to locate responsive records during mediation. The analyst contacted the Board's Teacher Staffing Co-ordinator as well as the Superintendent of Human Resources to assist her in locating responsive records. As a result, the lists which have been disclosed were located, but no additional responsive records were found.

I have also reviewed the representations submitted by the appellant. Many of them relate to allegations which are outside the mandate of this office to investigate.

In the circumstances of this appeal, and after considering the representations of both parties, I am satisfied that the Board made extensive and appropriate efforts to locate responsive records. Accordingly, I find that the Board's actions in attempting to locate responsive records were reasonable in the circumstances.

ORDER:

I uphold the Board's decision.

Original signed by: _____

John Higgins
Inquiry Officer

March 17, 1995 _____

POSTSCRIPT:

As noted above, the Board's initial decision letter referred to Board minutes as possibly containing relevant information. The decision letter directed the appellant to several libraries to review these minutes. Thus it appears that the Board was, in fact, denying access to this information under section 15(a) of the Act. This is confirmed by a reference to that section in the Board's representations.

These minutes were not at issue in this appeal. However, I would like to advise the Board, for future reference, that if it intends to deny access based upon public availability of records elsewhere, it is in fact claiming the exemption in section 15(a), and its decision letter **must make reference to this section**. On the other hand, if the Board is granting access under the Act by permitting inspection at a Board facility, this must also be expressly stated in the decision letter.



Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER M-492

Appeal M-9400632

Board of Education for the City of Hamilton



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NATURE OF THE APPEAL:

This is an appeal under the Municipal Freedom of Information and Protection of Privacy Act (the Act). The appellant has requested copies of records from the Board of Education for the City of Hamilton (the Board).

The part of the request which remains at issue in this appeal was for "any material that relates to my union activity, attendance of workshops, notes, requests for union time off, etc.". The Board's response to this aspect of the request indicated that "we have previously provided copies of all documents in your personnel file".

To place the request in context, it is important to note that the appellant has been an occasional teacher with the Board, and has filed a grievance in response to her dismissal from an occasional teaching position at one of the schools operated by the Board. She has also been a local official for a teachers' union.

The appellant believes that responsive records exist, and this is the basis for her appeal. Accordingly, the sole issue to be addressed is whether the Board's search for records was reasonable in the circumstances.

A Notice of Inquiry was provided to the Board and the appellant. Representations were received from both parties.

DISCUSSION:

REASONABLENESS OF SEARCH

Where a requester provides sufficient details about the records which he or she is seeking and the Board indicates that additional records do not exist, it is my responsibility to ensure that the Board has made a reasonable search to identify responsive records. While the Act does not require that the Board prove to the degree of absolute certainty that such records do not exist, the search which the Board undertakes must be conducted by knowledgeable staff in locations where the records in question might reasonably be located.

With respect to the portion of the request which is at issue, the Board's representations consist of the affidavit of its Manager of Employee Relations, who is also the Board's Freedom of Information and Privacy Co-ordinator (the Co-ordinator).

The Co-ordinator's affidavit states that she has exclusive responsibility for recording time off which pertains to union activities. This affidavit also indicates that the Co-ordinator checked her files, and found no records pertaining to requests by the appellant for time off with respect to union activities.

The Co-ordinator's affidavit further states that "with respect to documents relating to union activity, the Board provided [the appellant] with copies of all records in her personnel file". These disclosures were made in response to the request which became the subject of appeal

M-9400643, which was disposed of in Order M-491. The Board's decision letter also refers to this previous disclosure.

I was the decision-maker in Order M-491. I have examined the records which were at issue in that appeal, as well as the contents of the appellant's personnel file which were disclosed to her in full. These records relate to the appellant's grievance, or to other personnel matters which are totally unrelated to union activities. Thus the Board appears to take the position that records relating to the appellant's grievance would satisfy her request with respect to union activities.

I do not agree with this view. Given the wording of the request and the fact that the appellant has been a union official, I conclude that this request pertains to her general union activities, not to her grievance. This conclusion is reinforced by the fact that the appellant has submitted other requests pertaining to her grievance. Moreover, the Board's representations give no indication that records pertaining to the appellant's union activities, if they existed, would be in her personnel file. Accordingly, in my view, the Board's reliance on its previous disclosure of the personnel file is ill-founded.

The Co-ordinator's affidavit goes on to state that after the current appeal was filed, she conducted a second search and found no additional records. She also states that she has examined all sources where responsive records could reasonably be located. Unfortunately, except for the information provided about the search relating to requests for time off, referred to above, the Board's representations do not describe the parameters of the searches conducted at the request stage or during the appeals process. Nor do they indicate that any effort was made **at any time** to locate records pertaining to the appellant's general union activity.

I have also reviewed the representations submitted by the appellant. Many of them relate to allegations which are outside the mandate of this office to investigate.

After weighing and balancing all of the evidence and representations submitted to me, I find that, subject to one exception, the Board has not established that its search for records relating to the appellant's union activities was reasonable in the circumstances of this appeal. The exception is the Board's search relating to requests for time off for union activities. I find that the search for that type of record was reasonable in the circumstances.

ORDER:

1. I order the Board to conduct a further search for records relating to the appellant's union activities, with the exception of requests for time off pertaining to union activities, to communicate the results of this search to the appellant in writing, and to provide an access decision to the appellant with respect to any responsive records located as a result of this search, in the form contemplated by sections 19, 22 and 23 of the Act, all within thirty (30) days after the date of this order, without recourse to a time extension.

2. In order to verify compliance with Provision 1 of this order, I order the Board to provide me with a copy of the correspondence referred to in that provision within thirty-five (35) days after the date of this order. This should be sent to my attention, c/o Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario, M5S 2V1.

Original signed by: _____

John Higgins
Inquiry Officer

March 17, 1995 _____



Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER M-491

Appeal M-9400643

Board of Education for the City of Hamilton



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NATURE OF THE APPEAL:

This is an appeal under the Municipal Freedom of Information and Protection of Privacy Act (the Act). The appellant has been involved in grievance proceedings with the Board of Education for the City of Hamilton (the Board). She has requested the following information from the Board:

- (1) a copy of her complete personnel file maintained by the Board's Human Resources Department;
- (2) a copy of her complete file maintained by the Board's Employee Relations Department; and
- (3) a copy of her complete file with the Board's Legal Services Department or any law office retained by the Board, including all records in which her name appears.

The Board granted full access to the personnel file referred to in part 1 of the request. In response to part 2, the Board provided full access to the Step 1 and 2 grievance notes maintained by its Employee Relations Department, and partial access to an internal workplace report relating to the grievance. Also with respect to part 2, the Board identified, and denied access to, correspondence with its lawyers. With respect to part 3, the Board's response indicated that no responsive records existed.

Access to the undisclosed information was denied pursuant to the following exemptions:

- solicitor-client privilege - section 12
- evaluative or opinion material - section 38(c).

The appellant filed an appeal with the Commissioner's office, objecting to the denial of access and also indicating that additional responsive records ought to exist. Accordingly, this order will deal with the issues of access to records and the reasonableness of the Board's search for responsive records.

A Notice of Inquiry was sent to the Board and the appellant. Representations were received from both parties.

The records which were at issue at the beginning of my inquiry into this appeal were as follows (adopting the numbering system assigned in the Notice of Inquiry):

- | | |
|-----------|--|
| Record 1: | Handwritten notes, April 19, 1994 |
| Record 2: | Office Memo, April 16, 1994 |
| Record 3: | Letter from Board solicitors to Board, January 31, 1994 |
| Record 4: | Letter from Board solicitors to Board, February 1, 1994 |
| Record 5: | Letter from Board solicitors to Board, February 21, 1994 |
| Record 6: | Letter from Board to its solicitors, March 1, 1994. |

In its representations, the Board has indicated that it no longer seeks to exempt Records 3 and 5. In addition, the Board has not made any representations to support the discretionary exemptions it has claimed with respect to Records 1 and 6. I have reviewed Records 1, 3, 5 and 6 and determined that no mandatory exemptions apply. Accordingly, I will order the Board to disclose these records and will not consider them further in this order.

Therefore, the records which remain at issue are Records 2 and 4.

PRELIMINARY ISSUES:

LATE FILING OF APPEAL

Section 39(2) of the Act states as follows:

An appeal under subsection (1) shall be made within thirty days after the notice was given of the decision appealed from by filing with the Commissioner written notice of appeal.

In her letter of appeal, the appellant states that she received the Board's response to her request, dated September 23, 1994, on September 27, 1993. Since it is clearly impossible that the appellant received a letter dated September 23, 1994 on September 27, 1993, I will proceed on the basis that the appellant in fact received the Board's response on September 27, 1994. Thus her appeal, which was dated November 4, 1994, was filed outside the 30 day period prescribed by section 39(2).

The Board argues that the appeal is untimely and therefore ought not to proceed.

In Order P-155 former Commissioner Sidney B. Linden expressed the principle that the Freedom of Information and Protection of Privacy Act (which is similar to the Act, but applies to provincial, rather than municipal, institutions) should be interpreted liberally in favour of access to the process unless someone can show prejudice resulting from the delay. In that order, the former Commissioner held that where a delay in filing an appeal is substantial or the institution or any other affected person can show some prejudice resulting from delay, subsection 50(2) of the provincial Act (the equivalent of section 39(2) of the Act) is to be interpreted more strictly.

In this appeal, in order to comply with section 39(2) the appeal should have been filed by October 27, 1994. Instead, it was dated November 4, 1994. In my view, a delay of eight days does not qualify as "substantial" in the sense contemplated in Order P-155. Moreover, no evidence of prejudice has been provided. Accordingly, I am prepared to proceed with this appeal.

LATE RAISING OF EXEMPTIONS

The representations submitted by the Board also seek to claim several additional exemptions with respect to Record 2. These exemptions are as follows:

- third party information - section 10(1)
- advice or recommendations - section 7(1).

The exemption in section 10(1) is mandatory, and for that reason I will consider its possible application. Section 7(1), however, is discretionary.

As part of its efforts to expedite the processing of access appeals and in order to sensitize institutions about the prejudice which accrues to appellants when discretionary exemptions are not applied promptly, the Commissioner's office issued an IPC Practices publication in January 1993, entitled "Raising Discretionary Exemptions During an Appeal". This document, which was sent to all provincial and municipal institutions, indicates that:

The IPC has found that institutions frequently raise new discretionary exemptions after the appeal process is underway. When this happens, the appellant must be informed and given the opportunity to comment on the applicability of the new exemption claims. This additional step prolongs the appeal process, particularly when new discretionary exemptions are raised at the later stages of an appeal.

Effective March 1, 1993, the IPC will permit institutions to raise new discretionary exemptions only within a limited time frame - up to 35 days after the appeal has been opened. The initial notice sent out by the IPC will specify the deadline for claiming any new discretionary exemptions.

The objective of this policy is to provide institutions with a window of opportunity to raise new discretionary exemptions but not at a stage in the appeal where the integrity of the process is compromised or the interests of the appellant prejudiced.

In accordance with this policy, the Confirmation of Appeal sent to the Board when this appeal was filed, indicated that the institution had 35 days from the date of the Notice (that is, until December 15, 1994) to claim any additional discretionary exemptions. The Board's representations, which first raised the exemption in section 7(1), were not sent to this office until February 15, 1995. In the absence of any explanation for this delay in claiming this exemption, I am not prepared to consider it.

The Board's representations include an affidavit sworn by the author of Record 2, who submits that its disclosure would be an unjustified invasion of her personal privacy. Because of the privacy issue, I will consider whether this submission has merit. The exemptions which relate to invasion of privacy are found in sections 14(1) and 38(b) of the Act.

In summary, in addition to the exemptions originally claimed, I will consider the possible application of sections 10(1), 14(1) and 38(b) to Record 2.

Before leaving this matter, however, I must comment further on the Board's attempt to claim additional exemptions in its representations. Because of the time sensitivity of many types of information, the Commissioner's office has adopted policies such as the one referred to above to ensure the timely processing of appeals. Generally speaking, it is prejudicial to the access scheme in the Act to claim new exemptions at the representations stage, because this can delay the appeals process and any disclosure which may ultimately be ordered. Moreover, the Act clearly contemplates that decisions relating to exemptions will be made **before** the response to an access request is sent to the requester, in accordance with sections 19 and 22.

In this appeal, the Board's representations expressly attempt to raise the exemptions provided by sections 7(1) and 10(1), and the Board's reference to a possible unjustified invasion of personal privacy implicitly raises the exemptions found in sections 14(1) and 38(b). For the reasons just set out, I have agreed to consider several of these exemptions. In many cases, this would have required a supplementary notice to the appellant to permit her to comment on these new exemptions, which would necessarily delay completion of the appeal.

In this case, because of the determination I will make in this order relating to sections 10(1), 14(1) and 38(b), this additional notification was not required and the appeals process was not delayed. In future, however, I would urge the Board to undertake a thorough assessment of the records, and make a full determination regarding exemptions which may apply, at the **request** stage.

SUMMARY OF RECORDS AND EXEMPTIONS AT ISSUE

The exemptions to be considered in this order are those provided by sections 10(1), 12, 14(1), 38(b) and 38(c).

Because these records appear to contain the appellant's own personal information, I will also consider the possible application of section 38(a) of the Act.

Based upon the Board's claims and my decisions with respect to consideration of additional exemptions, the records at issue and the exemptions to be considered with respect to each of them are as follows:

Record 2: Sections 10(1) and 38(a), sections 14(1) and 38(b), and section 38(c);
Record 4: Sections 12 and 38(a).

DISCUSSION:

PERSONAL INFORMATION/INVASION OF PRIVACY

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual, including any identifying number assigned to the individual and the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual.

Both of the records which remain at issue relate to the appellant's grievance, and I find that both of them contain her personal information.

It has been previously established that access requests for records which contain the requester's own personal information must be considered under Part II of the Act, which sets out procedures and exemptions to be followed in such cases (Order M-352). In particular, section 38 of the Act sets out the exemptions which may apply to records containing the requester's own personal information.

As previously noted, the author of Record 2 (in an affidavit which forms part of the Board's representations) claims that its disclosure would be an unjustified invasion of her personal privacy. As I noted in my discussion of this issue under "Late Raising of Exemptions", above, the exemptions relating to invasions of privacy are found in sections 14(1)(a) and 38(b) of the Act.

I have previously found that Record 2 contains the personal information of the appellant. In these circumstances, Order M-352 indicates that the exemption to consider with respect to a possible unjustified invasion of personal privacy is section 38(b), rather than section 14(1). Accordingly, section 14(1) does not apply in this case.

Under section 38(b), where a record contains the personal information of both the appellant and other individuals and the institution determines that the disclosure of the information would constitute an unjustified invasion of another individual's personal privacy, the institution has the discretion to deny the requester access to that information.

Disclosure of Record 2 could only be an unjustified invasion of the author's personal privacy if it contained her personal information. This record was prepared in its author's professional capacity. Many previous orders (see, for example, Order M-25) have held that a record prepared in an individual's professional capacity, and which does not relate to that individual personally, does not constitute that individual's personal information. Since no part of Record 2 relates to its author in any personal way, I find that it does not contain the author's personal information, and in these circumstances, the exemption in section 38(b) cannot apply.

DISCRETION TO DENY REQUESTER'S OWN INFORMATION

Under section 38(a), the institution has the discretion to deny access to an individual's own personal information in instances where certain exemptions set out in Part I of the Act would otherwise apply to that information. The exemptions in sections 10 and 12 are both referred to in section 38(a). As a preliminary step in determining whether the exemption in section 38(a) applies, I will consider whether Record 2 qualifies for exemption under section 10, and whether Record 4 qualifies for exemption under section 12.

THIRD PARTY INFORMATION

The Board claims that Record 2 qualifies for exemption under section 10(1) of the Act.

Section 10(1)(b)

The Board's representations assert that disclosure of Record 2 could result in this type of information not being supplied in the future, in apparent reference to section 10(1)(b).

For a record to qualify for exemption under section 10(1)(b), each part of the following three-part test must be satisfied:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; **and**
2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; **and**
3. the prospect of disclosure of the record must give rise to a reasonable expectation that the harm specified in section 10(1)(b) will occur.

With respect to part 1 of the test, I find that Record 2 does not contain any trade secret or scientific, technical, commercial or financial information. In Order P-653, Inquiry Officer Holly Big Canoe made the following comment about the meaning of "labour relations information" in the context of section 17(1) of the provincial Freedom of Information and Protection of Privacy Act, which is the equivalent of section 10(1) of the Act:

In my view, the term "labour relations information" refers to information concerning the **collective** relationship between an employer and its employees.

I agree with this view, and adopt it for the purposes of this appeal. Record 2 contains no information about the collective relationship between an employer and its employees and accordingly, I find that disclosure of this record would not reveal any of the types of information referred to in the preamble to section 10(1). For that reason, part 1 of the test has not been met and the exemption cannot apply.

There are additional reasons why this record does not qualify for exemption under this section. Turning to the second part of the test, it is my view that the information which would be revealed by disclosure of the record must have been "supplied" by an external source. As previously noted, this record was written by a Board employee. It refers to "concerns" of certain parties external to the Board, but does not indicate what these concerns were. In my view, its disclosure would not reveal information which was "supplied" to the Board by an external source, and section 10(1)(b) does not apply.

Moreover, with respect to the third part of the test, section 10(1)(b) of the Act requires the Board to establish that disclosure could reasonably be expected to "result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied". The Board's representations make no reference to the public interest. Also, the author of this record is a Board employee, and the record was prepared in the course of her employment. In my view, the assertion that she would cease providing this type of information, which her employment duties require her to provide, has no reasonable basis. Accordingly, part 3 of the test has also not been met.

As noted above, each part of the test must be met in order to meet the requirements of section 10(1)(b). Therefore, failure to meet **any one** part of the test means that the exemption does not apply. Since Record 2 fails to meet any part of the test, it cannot qualify for exemption under section 10(1)(b).

Section 10(1)(d)

The Board's representations with respect to Record 2 also refer to section 10(1)(d). In this regard, the Board submits that "the record reveals labour relations information supplied in confidence".

Previous orders have established a test setting out the requirements to be met in order for a record to qualify for exemption under section 10(1)(d). The first two parts of this test are identical to parts 1 and 2 of the test set out above in my discussion of section 10(1)(b).

The third part of the test is somewhat different under section 10(1)(d), requiring the Board to establish that disclosure of the record could reasonably be expected to:

- (a) reveal information of the type set out in section 10(1) which was supplied to a conciliation officer, a mediator, a labour relations officer, or another person appointed to resolve a labour relations dispute;

OR

- (b) reveal the report of a conciliation officer, a mediator, a labour relations officer, or another person appointed to resolve a labour relations dispute.

As with section 10(1)(b), all three parts of this test must be met in order to qualify for exemption under section 10(1)(d).

As noted in my discussion of section 10(1)(b), above, the information in Record 2 does not come within any of the categories described in section 10(1). Accordingly, Record 2 does not meet part 1 of the test for exemption under section 10(1)(d).

My findings with respect to section 10(1)(b) also indicated that the information in Record 2 was not "supplied" to the Board within the meaning of section 10(1), and for this reason, part 2 of the test for exemption under section 10(1)(d) has also not been met.

Moreover, there is no evidence to indicate that this record was supplied to a conciliation officer, a mediator, a labour relations officer, or other person appointed to resolve a labour relations dispute, and it is apparent that the record does not reveal the report of such a person. Accordingly, part 3 of the test for exemption under section 10(1)(d) has also not been met.

As noted above, each part of the test must be met in order to meet the requirements of section 10(1)(d). Therefore, failure to meet **any one** part of the test means that the exemption does not apply. Since Record 2 fails to meet any part of the test, it cannot qualify for exemption under section 10(1)(d).

Because Record 2 does not qualify for exemption under section 10(1), it is not exempt under section 38(a).

SOLICITOR-CLIENT PRIVILEGE

The Board claims that Record 4 qualifies for exemption under section 12.

This exemption consists of two branches, which provide an institution with the discretion to refuse to disclose:

1. a record that is subject to the common law solicitor-client privilege (Branch 1); and
2. a record which was prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation (Branch 2).

In order for a record to be subject to the common law solicitor-client privilege (Branch 1), the institution must provide evidence that the record satisfies either of the following tests:

1. (a) there is a written or oral communication, **and**
(b) the communication must be of a confidential nature, **and**
(c) the communication must be between a client (or his agent) and a legal advisor, **and**
(d) the communication must be directly related to seeking, formulating or giving legal advice;

OR

2. the record was created or obtained especially for the lawyer's brief for existing or contemplated litigation.

I find that Record 4 qualifies for exemption under the first part of Branch 1 of this exemption, since its disclosure would reveal confidential communications between solicitor and client directly related to seeking, formulating or giving legal advice (Order 49). Accordingly, the exemption in section 38(a) applies to Record 4.

EVALUATIVE OR OPINION MATERIAL

The Board claims that this exemption, provided by section 38(c) of the Act, applies to Record 2.

Section 38(c) states as follows:

A head may refuse to disclose to the individual to whom the information relates personal information,

that is evaluative or opinion material compiled solely for the purpose of determining suitability, eligibility or qualifications for employment or for the awarding of contracts and other benefits by an institution if the disclosure would reveal the identity of a source who furnished information to the institution in circumstances where it may reasonably have been assumed that the identity of the source would be held in confidence;

In Order M-132, Assistant Commissioner Irwin Glasberg established what was, in effect, a four-part test for a record to qualify for exemption under section 38(c) of the Act. For the exemption to be successfully claimed, an institution and/or affected person must establish that:

1. The personal information is evaluative or opinion material;
2. The personal information was compiled solely for the purpose of determining suitability, eligibility or qualifications for employment or for the awarding of government contracts and other benefits;

3. The information was supplied to the institution in circumstances where it may reasonably have been assumed that the identity of the source would be held in confidence;
4. The disclosure of the record would reveal the identity of the source of the information.

Each element of the four-part test must be satisfied in order for the exemption to apply. The failure to meet any part of the test means that section 38(c) will not be available to exempt the personal information contained in the record from disclosure.

The Board's representations respecting this exemption, given in the form of an affidavit signed by the author of this record, state that:

The internal workplace report sets out my opinion regarding the grievance and contains certain recommendations. The memo was drafted for the purpose of determining suitability of [the appellant] for employment. When furnishing such information, my views were expressed in confidence and in the belief that such views or opinions would not be disclosed.

Turning to the part 3 of the test, it is significant that the Board's representations do not assert that there was any expectation that the **identity of the source** would be kept confidential, and no other evidence has been produced to indicate that this expectation existed, or had any reasonable basis. In and of itself, this would support a finding that part 3 of the test has not been met.

It is also significant that the author of Record 2 is a senior Board employee in the human resources area, and her employment responsibilities could be expected to require preparation of documents such as this. In my view, the author's position with the Board indicates that it would not be reasonable to assume that her identity as a source, with respect to this particular record, would be held in confidence.

I find that part 3 of the test has not been met and this exemption does not apply. As no other discretionary exemptions are under consideration with regard to Record 2, and no mandatory exemption applies, it should be disclosed.

REASONABLENESS OF SEARCH

Where a requester provides sufficient details about the records which he or she is seeking and the Board indicates that additional records do not exist, it is my responsibility to ensure that the Board has made a reasonable search to identify responsive records. While the Act does not require that the Board prove to the degree of absolute certainty that such records do not exist, the search which the Board undertakes must be conducted by knowledgeable staff in locations where the records in question might reasonably be located.

With respect to part 1 of the request (as summarized at the beginning of this order), which pertains to the appellant's personnel file, the Board has supplied an affidavit executed by its Records Analyst. The affidavit indicated that this individual contacted the Teaching Staffing Co-ordinator (the individual who maintains personnel files of this type) and obtained the appellant's complete personnel file, which was disclosed in full.

As outlined at the beginning of this order, parts 2 and 3 of the request pertain to the appellant's files maintained by the Board's Employee Relations Department, Legal Services Department, and any outside law firm retained by the Board. With respect to its search for records responsive to these parts of the request, the Board supplied the affidavit of its Manager of Employee Relations, who is also the Freedom of Information and Privacy Co-ordinator (the Co-ordinator).

The Co-ordinator's affidavit indicates that she personally conducted the search within the Board's Employee Relations Department (referred to in part 2 of the request), which she would be familiar with by virtue of her position as manager of that department. In this regard, she also consulted two Employee Relations officers concerning the existence of any responsive records. As a result of these searches, grievance notes for Steps 1 and 2 were located and disclosed, and Records 2, 3, 4 and 5 were also located. After the appeal was filed, the Co-ordinator conducted a further search within the Employee Relations Department, as a result of which one further record was located and disclosed.

With respect to part 3 of the request, the Co-ordinator's affidavit indicates that she met with the Board's solicitors to "respond to [the appellant]'s request for copies of legal documents which are in the custody or control of the Board". It is not clear whether this meeting was with in-house counsel or external solicitors. In any event, there is no indication that any search for records responsive to part 3 of the request was undertaken, either in-house or at the offices of any external solicitors retained by the Board.

The Board's decision letter states that "[l]egal advice regarding your grievance process was obtained verbally, and no documents were created". However, this statement is directly contradicted by the existence of Record 4 (as well as Records 3 and 5, which the Board has agreed to disclose). Moreover, not all records created in the course of a solicitor-client relationship contain legal advice. I also note that, although this letter was made an exhibit to one of the affidavits submitted by the Board, the statement just quoted is not mentioned anywhere in the Board's representations. For all these reasons, I do not accept the assertion that "no documents were created", and in my view, a search ought to have been conducted with respect to part 3 of the request.

Many of the comments in the appellant's representations refer to classes of records other than those at issue in this appeal, or to allegations which are outside the mandate of this office to investigate.

Based upon the representations and evidence provided, I am satisfied that the Board's searches for records with respect to parts 1 and 2 of the request were reasonable in the circumstances, since actual searches were conducted by staff who would be knowledgeable about the records they were seeking to find.

However, since I have been provided with no evidence of a search relating to part 3 of the request, and the Board's representations provide no grounds to justify a conclusion that a search need not have been undertaken, I am not satisfied that reasonable efforts were made in this regard. Accordingly, I will order the Board to do a further search for records with respect to part 3 of the request.

I note that the request made explicit reference to records in the custody of any law firm retained by the Board, as well as its Legal Services Department. In this regard, it is significant that some types of records in the custody of a law firm or independent solicitor retained by the Board could be under the **control** of the Board, and for this reason, they could be subject to the access scheme in the Act by virtue of sections 17(1) and 36(1).

To assist the Board in determining which responsive records in the custody of any law firm or independent solicitor retained by the Board would be under its control for the purposes of the Act, I will set out the following extract from Order M-371, in which I dealt with this subject.

In my view, records in the custody of a solicitor which are the property of a client may be said to be under the client's control for the purposes of the Act (Order M-315). Several legal authorities are relevant to the issue of ownership of client records in the custody of solicitors.

For instance, section 6(6) of the Solicitors' Act, R.S.O. 1990, c. S15, indicates that, in proceedings relating to solicitors' accounts, documents which belong to the client must be dealt with as the client instructs, upon payment of all outstanding fees. That section states as follows:

Upon payment by the client or other person of what, if anything, appears to be due to the solicitor, or if nothing is found to be due to the solicitor, the solicitor, if required, **shall** deliver to the client or other person, or as the client or other person directs, all deeds, books, papers and writings in the solicitor's possession, custody or power **belonging** to the client. (emphasis added)

In addition, this issue is addressed in a more general way in Aggio v. Rosenberg et al. (1981) C.P.C. 7, where the court quotes with approval from a text entitled The Law Relating to Solicitors (6th edition) by Corderley.

The Court reproduced the following excerpts from that textbook relating to ownership of solicitors' records:

Documents in existence before the retainer commences and sent to the solicitor by the client or by a third party during the currency of the retainer present no difficulty since their ownership must be readily apparent. The solicitor holds them as agent for and on behalf of the client or third party, and on the termination of the retainer must dispose of them (subject to any lien he may have for unpaid costs ...) as the client or third party may direct.

Documents which only come into existence during the currency of the retainer and for the purpose of business transacted by the solicitor pursuant to the retainer, fall into four broad categories:

- (i) Documents prepared by the solicitor for the benefit of the client and which may be said to have been paid for [by] the client, **belong to the client.**
- (ii) Documents prepared by the solicitor for his own benefit or protection, the preparation of which is not regarded as an item chargeable against the client, belong to the solicitor.
- (iii) Documents sent by the client to the solicitor during the course of the retainer, the property in which was intended at the date of despatch to pass from the client to the solicitor, e.g., letters, belong to the solicitor.
- (iv) Documents prepared by a third party during the course of the retainer and sent to the solicitor (other than at the solicitor's expense), e.g., letters, **belong to the client.** (emphases added).

I direct the Board to bear these considerations in mind in assessing whether any responsive records found in the custody of external solicitors retained by the Board are under the Board's control.

ORDER:

1. I uphold the Board's decision to deny access to Record 4.
2. I order the Board to disclose Records 1, 2, 3, 5 and 6 to the appellant within fifteen (15) days after the date of this order.
3. In order to verify compliance with Provision 2, I reserve the right to require the Board to provide me with a copy of the records disclosed to the appellant in accordance with that provision.

4. I order the Board to arrange for a review of any records responsive to part 3 of the request (as summarized at the beginning of this order) in the custody of any law firm or independent solicitor it has retained with respect to its relations with the appellant in order to determine which of these records are under its control, to communicate the results of this review to the appellant in writing, and to provide an access decision to the appellant with respect to any responsive records under its control, in the form contemplated by sections 19, 22 and 23 of the Act, all within thirty (30) days after the date of this order, without recourse to a time extension.
5. Should the Board have a Legal Services Department or any in-house counsel, I also order the Board to search the records of that department and/or counsel to determine whether any records responsive to part 3 of the request exist, to communicate the results of this search to the appellant in writing, and to provide an access decision to the appellant with respect to any responsive records located as a result of this search, in the form contemplated by sections 19, 22 and 23 of the Act, all within thirty (30) days after the date of this order, without recourse to a time extension.
6. In order to verify compliance with Provisions 4 and 5 of this order, I order the Board to provide me with a copy of the correspondence referred to in Provisions 4 and 5 within thirty-five (35) days after the date of this order. This should be sent to my attention, c/o Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario, M5S 2V1.

Original signed by: _____

John Higgins
Inquiry Officer

March 17, 1995

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Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

URBAN MUNICIPAL

JUN 17 1996

GOVERNMENT DOCUMENTS

ORDER M-605

Appeal M-9500269

Board of Education for the City of Hamilton



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NATURE OF THE APPEAL:

This is an appeal under the Municipal Freedom of Information and Protection of Privacy Act (the Act). In September 1994 the appellant submitted a request to the Board of Education for the City of Hamilton (the Board), in several parts. The part of the request under consideration in this order was for a "... copy of my file from [the Board's] legal services department or legal office working for [the Board]".

To place the request in context, it is important to note that the appellant has been an occasional teacher with the Board, and has filed a grievance in response to her dismissal from an occasional teaching position at one of the schools operated by the Board. She is also involved in two ongoing disputes with the Board before the Ontario Labour Relations Board.

In its initial response to this part of the request, the Board indicated that no responsive records existed. The appellant filed an appeal of this decision with the Commissioner's office. This aspect of the Board's decision was dealt with in Order M-491, which I issued. In that order, I indicated that records in the custody of the Board's solicitors which are, in law, the property of the Board would be subject to the Board's control, and would thus be subject to the Act. I ordered the Board to conduct an additional search, and to include records in the Board's control which are in the custody of its solicitors.

The Board did so, and located eight responsive records. Five of these have been disclosed, and the remaining three records, consisting of correspondence between the Board and its solicitors, remain at issue in this appeal.

The Board has denied access to these three records in full, claiming that they are exempt from disclosure under the following exemptions in the Act:

- advice or recommendations - section 7(1)
- solicitor-client privilege - section 12.

The appellant filed an appeal of this denial of access with the Commissioner's office, and this appeal is the subject of this order. During mediation, the appellant agreed that the issues in this appeal are limited to whether the Board's denial of access is justified, based on the exemptions claimed.

A Notice of Inquiry was sent to the appellant and the Board. Representations were received from both parties.

Because the records appeared to contain the appellant's personal information, the Notice of Inquiry raised the possible application of section 38(a) of the Act (discretion to refuse requester's own information).

DISCUSSION:

DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual, including any identifying number assigned to the individual and the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual.

I have reviewed the three records at issue. All of them mention legal issues between the Board and the appellant, and for this reason, I find that all three records at issue contain her personal information.

Section 36(1) of the Act gives individuals a general right of access to their own personal information held by a government body. Section 38 provides a number of exceptions to this general right of access.

Under section 38(a) of the Act, the Board has the discretion to deny access to an individual's own personal information in instances where certain exemptions would otherwise apply to that information. This section states:

A head may refuse to disclose to the individual to whom the information relates personal information,

if section 6, 7, 8, 9, 10, 11, 12, 13 or 15 would apply to the disclosure of that personal information. (emphasis added)

In order to determine whether this exemption applies, I will analyse whether the records qualify for exemption under section 7(1) or 12 of the Act.

SOLICITOR-CLIENT PRIVILEGE

The Board claims that all three of the records at issue qualify for exemption under section 12 of the Act because they are subject to solicitor-client privilege. This section states:

A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation.

Section 12 consists of two branches, which provide an institution with the discretion to refuse to disclose:

As part of its representations, the Board has provided the affidavit of its Records Analyst. This affidavit describes the efforts made to locate responsive records during mediation. The analyst contacted the Board's Teacher Staffing Co-ordinator as well as the Superintendent of Human Resources to assist her in locating responsive records. As a result, the lists which have been disclosed were located, but no additional responsive records were found.

I have also reviewed the representations submitted by the appellant. Many of them relate to allegations which are outside the mandate of this office to investigate.

In the circumstances of this appeal, and after considering the representations of both parties, I am satisfied that the Board made extensive and appropriate efforts to locate responsive records. Accordingly, I find that the Board's actions in attempting to locate responsive records were reasonable in the circumstances.

ORDER:

I uphold the Board's decision.

Original signed by: _____

March 17, 1995 _____

John Higgins

Inquiry Officer

POSTSCRIPT:

As noted above, the Board's initial decision letter referred to Board minutes as possibly containing relevant information. The decision letter directed the appellant to several libraries to review these minutes. Thus it appears that the Board was, in fact, denying access to this information under section 15(a) of the Act. This is confirmed by a reference to that section in the Board's representations.

These minutes were not at issue in this appeal. However, I would like to advise the Board, for future reference, that if it intends to deny access based upon public availability of records elsewhere, it is in fact claiming the exemption in section 15(a), and its decision letter **must make reference to this section**. On the other hand, if the Board is granting access under the Act by permitting inspection at a Board facility, this must also be expressly stated in the decision letter.



Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER M-492

Appeal M-9400632

Board of Education for the City of Hamilton



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NATURE OF THE APPEAL:

This is an appeal under the Municipal Freedom of Information and Protection of Privacy Act (the Act). The appellant has requested copies of records from the Board of Education for the City of Hamilton (the Board).

The part of the request which remains at issue in this appeal was for "any material that relates to my union activity, attendance of workshops, notes, requests for union time off, etc.". The Board's response to this aspect of the request indicated that "we have previously provided copies of all documents in your personnel file".

To place the request in context, it is important to note that the appellant has been an occasional teacher with the Board, and has filed a grievance in response to her dismissal from an occasional teaching position at one of the schools operated by the Board. She has also been a local official for a teachers' union.

The appellant believes that responsive records exist, and this is the basis for her appeal. Accordingly, the sole issue to be addressed is whether the Board's search for records was reasonable in the circumstances.

A Notice of Inquiry was provided to the Board and the appellant. Representations were received from both parties.

DISCUSSION:

REASONABLENESS OF SEARCH

Where a requester provides sufficient details about the records which he or she is seeking and the Board indicates that additional records do not exist, it is my responsibility to ensure that the Board has made a reasonable search to identify responsive records. While the Act does not require that the Board prove to the degree of absolute certainty that such records do not exist, the search which the Board undertakes must be conducted by knowledgeable staff in locations where the records in question might reasonably be located.

With respect to the portion of the request which is at issue, the Board's representations consist of the affidavit of its Manager of Employee Relations, who is also the Board's Freedom of Information and Privacy Co-ordinator (the Co-ordinator).

The Co-ordinator's affidavit states that she has exclusive responsibility for recording time off which pertains to union activities. This affidavit also indicates that the Co-ordinator checked her files, and found no records pertaining to requests by the appellant for time off with respect to union activities.

The Co-ordinator's affidavit further states that "with respect to documents relating to union activity, the Board provided [the appellant] with copies of all records in her personnel file". These disclosures were made in response to the request which became the subject of appeal

M-9400643, which was disposed of in Order M-491. The Board's decision letter also refers to this previous disclosure.

I was the decision-maker in Order M-491. I have examined the records which were at issue in that appeal, as well as the contents of the appellant's personnel file which were disclosed to her in full. These records relate to the appellant's grievance, or to other personnel matters which are totally unrelated to union activities. Thus the Board appears to take the position that records relating to the appellant's grievance would satisfy her request with respect to union activities.

I do not agree with this view. Given the wording of the request and the fact that the appellant has been a union official, I conclude that this request pertains to her general union activities, not to her grievance. This conclusion is reinforced by the fact that the appellant has submitted other requests pertaining to her grievance. Moreover, the Board's representations give no indication that records pertaining to the appellant's union activities, if they existed, would be in her personnel file. Accordingly, in my view, the Board's reliance on its previous disclosure of the personnel file is ill-founded.

The Co-ordinator's affidavit goes on to state that after the current appeal was filed, she conducted a second search and found no additional records. She also states that she has examined all sources where responsive records could reasonably be located. Unfortunately, except for the information provided about the search relating to requests for time off, referred to above, the Board's representations do not describe the parameters of the searches conducted at the request stage or during the appeals process. Nor do they indicate that any effort was made **at any time** to locate records pertaining to the appellant's general union activity.

I have also reviewed the representations submitted by the appellant. Many of them relate to allegations which are outside the mandate of this office to investigate.

After weighing and balancing all of the evidence and representations submitted to me, I find that, subject to one exception, the Board has not established that its search for records relating to the appellant's union activities was reasonable in the circumstances of this appeal. The exception is the Board's search relating to requests for time off for union activities. I find that the search for that type of record was reasonable in the circumstances.

ORDER:

1. I order the Board to conduct a further search for records relating to the appellant's union activities, with the exception of requests for time off pertaining to union activities, to communicate the results of this search to the appellant in writing, and to provide an access decision to the appellant with respect to any responsive records located as a result of this search, in the form contemplated by sections 19, 22 and 23 of the Act, all within thirty (30) days after the date of this order, without recourse to a time extension.

2. In order to verify compliance with Provision 1 of this order, I order the Board to provide me with a copy of the correspondence referred to in that provision within thirty-five (35) days after the date of this order. This should be sent to my attention, c/o Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario, M5S 2V1.

Original signed by:

March 17, 1995

John Higgins
Inquiry Officer



Information and Privacy
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ORDER M-491

Appeal M-9400643

Board of Education for the City of Hamilton



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NATURE OF THE APPEAL:

This is an appeal under the Municipal Freedom of Information and Protection of Privacy Act (the Act). The appellant has been involved in grievance proceedings with the Board of Education for the City of Hamilton (the Board). She has requested the following information from the Board:

- (1) a copy of her complete personnel file maintained by the Board's Human Resources Department;
- (2) a copy of her complete file maintained by the Board's Employee Relations Department; and
- (3) a copy of her complete file with the Board's Legal Services Department or any law office retained by the Board, including all records in which her name appears.

The Board granted full access to the personnel file referred to in part 1 of the request. In response to part 2, the Board provided full access to the Step 1 and 2 grievance notes maintained by its Employee Relations Department, and partial access to an internal workplace report relating to the grievance. Also with respect to part 2, the Board identified, and denied access to, correspondence with its lawyers. With respect to part 3, the Board's response indicated that no responsive records existed.

Access to the undisclosed information was denied pursuant to the following exemptions:

- solicitor-client privilege - section 12
- evaluative or opinion material - section 38(c).

The appellant filed an appeal with the Commissioner's office, objecting to the denial of access and also indicating that additional responsive records ought to exist. Accordingly, this order will deal with the issues of access to records and the reasonableness of the Board's search for responsive records.

A Notice of Inquiry was sent to the Board and the appellant. Representations were received from both parties.

The records which were at issue at the beginning of my inquiry into this appeal were as follows (adopting the numbering system assigned in the Notice of Inquiry):

- | | |
|-----------|--|
| Record 1: | Handwritten notes, April 19, 1994 |
| Record 2: | Office Memo, April 16, 1994 |
| Record 3: | Letter from Board solicitors to Board, January 31, 1994 |
| Record 4: | Letter from Board solicitors to Board, February 1, 1994 |
| Record 5: | Letter from Board solicitors to Board, February 21, 1994 |
| Record 6: | Letter from Board to its solicitors, March 1, 1994. |

In its representations, the Board has indicated that it no longer seeks to exempt Records 3 and 5. In addition, the Board has not made any representations to support the discretionary exemptions it has claimed with respect to Records 1 and 6. I have reviewed Records 1, 3, 5 and 6 and determined that no mandatory exemptions apply. Accordingly, I will order the Board to disclose these records and will not consider them further in this order.

Therefore, the records which remain at issue are Records 2 and 4.

PRELIMINARY ISSUES:

LATE FILING OF APPEAL

Section 39(2) of the Act states as follows:

An appeal under subsection (1) shall be made within thirty days after the notice was given of the decision appealed from by filing with the Commissioner written notice of appeal.

In her letter of appeal, the appellant states that she received the Board's response to her request, dated September 23, 1994, on September 27, 1993. Since it is clearly impossible that the appellant received a letter dated September 23, 1994 on September 27, 1993, I will proceed on the basis that the appellant in fact received the Board's response on September 27, 1994. Thus her appeal, which was dated November 4, 1994, was filed outside the 30 day period prescribed by section 39(2).

The Board argues that the appeal is untimely and therefore ought not to proceed.

In Order P-155 former Commissioner Sidney B. Linden expressed the principle that the Freedom of Information and Protection of Privacy Act (which is similar to the Act, but applies to provincial, rather than municipal, institutions) should be interpreted liberally in favour of access to the process unless someone can show prejudice resulting from the delay. In that order, the former Commissioner held that where a delay in filing an appeal is substantial or the institution or any other affected person can show some prejudice resulting from delay, subsection 50(2) of the provincial Act (the equivalent of section 39(2) of the Act) is to be interpreted more strictly.

In this appeal, in order to comply with section 39(2) the appeal should have been filed by October 27, 1994. Instead, it was dated November 4, 1994. In my view, a delay of eight days does not qualify as "substantial" in the sense contemplated in Order P-155. Moreover, no evidence of prejudice has been provided. Accordingly, I am prepared to proceed with this appeal.

LATE RAISING OF EXEMPTIONS

The representations submitted by the Board also seek to claim several additional exemptions with respect to Record 2. These exemptions are as follows:

- third party information - section 10(1)
- advice or recommendations - section 7(1).

The exemption in section 10(1) is mandatory, and for that reason I will consider its possible application. Section 7(1), however, is discretionary.

As part of its efforts to expedite the processing of access appeals and in order to sensitize institutions about the prejudice which accrues to appellants when discretionary exemptions are not applied promptly, the Commissioner's office issued an IPC Practices publication in January 1993, entitled "Raising Discretionary Exemptions During an Appeal". This document, which was sent to all provincial and municipal institutions, indicates that:

The IPC has found that institutions frequently raise new discretionary exemptions after the appeal process is underway. When this happens, the appellant must be informed and given the opportunity to comment on the applicability of the new exemption claims. This additional step prolongs the appeal process, particularly when new discretionary exemptions are raised at the later stages of an appeal.

Effective March 1, 1993, the IPC will permit institutions to raise new discretionary exemptions only within a limited time frame - up to 35 days after the appeal has been opened. The initial notice sent out by the IPC will specify the deadline for claiming any new discretionary exemptions.

The objective of this policy is to provide institutions with a window of opportunity to raise new discretionary exemptions but not at a stage in the appeal where the integrity of the process is compromised or the interests of the appellant prejudiced.

In accordance with this policy, the Confirmation of Appeal sent to the Board when this appeal was filed, indicated that the institution had 35 days from the date of the Notice (that is, until December 15, 1994) to claim any additional discretionary exemptions. The Board's representations, which first raised the exemption in section 7(1), were not sent to this office until February 15, 1995. In the absence of any explanation for this delay in claiming this exemption, I am not prepared to consider it.

The Board's representations include an affidavit sworn by the author of Record 2, who submits that its disclosure would be an unjustified invasion of her personal privacy. Because of the privacy issue, I will consider whether this submission has merit. The exemptions which relate to invasion of privacy are found in sections 14(1) and 38(b) of the Act.

In summary, in addition to the exemptions originally claimed, I will consider the possible application of sections 10(1), 14(1) and 38(b) to Record 2.

Before leaving this matter, however, I must comment further on the Board's attempt to claim additional exemptions in its representations. Because of the time sensitivity of many types of information, the Commissioner's office has adopted policies such as the one referred to above to ensure the timely processing of appeals. Generally speaking, it is prejudicial to the access scheme in the Act to claim new exemptions at the representations stage, because this can delay the appeals process and any disclosure which may ultimately be ordered. Moreover, the Act clearly contemplates that decisions relating to exemptions will be made **before** the response to an access request is sent to the requester, in accordance with sections 19 and 22.

In this appeal, the Board's representations expressly attempt to raise the exemptions provided by sections 7(1) and 10(1), and the Board's reference to a possible unjustified invasion of personal privacy implicitly raises the exemptions found in sections 14(1) and 38(b). For the reasons just set out, I have agreed to consider several of these exemptions. In many cases, this would have required a supplementary notice to the appellant to permit her to comment on these new exemptions, which would necessarily delay completion of the appeal.

In this case, because of the determination I will make in this order relating to sections 10(1), 14(1) and 38(b), this additional notification was not required and the appeals process was not delayed. In future, however, I would urge the Board to undertake a thorough assessment of the records, and make a full determination regarding exemptions which may apply, at the **request** stage.

SUMMARY OF RECORDS AND EXEMPTIONS AT ISSUE

The exemptions to be considered in this order are those provided by sections 10(1), 12, 14(1), 38(b) and 38(c).

Because these records appear to contain the appellant's own personal information, I will also consider the possible application of section 38(a) of the Act.

Based upon the Board's claims and my decisions with respect to consideration of additional exemptions, the records at issue and the exemptions to be considered with respect to each of them are as follows:

- Record 2: Sections 10(1) and 38(a), sections 14(1) and 38(b), and section 38(c);
- Record 4: Sections 12 and 38(a).

DISCUSSION:

PERSONAL INFORMATION/INVASION OF PRIVACY

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual, including any identifying number assigned to the individual and the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual.

Both of the records which remain at issue relate to the appellant's grievance, and I find that both of them contain her personal information.

It has been previously established that access requests for records which contain the requester's own personal information must be considered under Part II of the Act, which sets out procedures and exemptions to be followed in such cases (Order M-352). In particular, section 38 of the Act sets out the exemptions which may apply to records containing the requester's own personal information.

As previously noted, the author of Record 2 (in an affidavit which forms part of the Board's representations) claims that its disclosure would be an unjustified invasion of her personal privacy. As I noted in my discussion of this issue under "Late Raising of Exemptions", above, the exemptions relating to invasions of privacy are found in sections 14(1)(a) and 38(b) of the Act.

I have previously found that Record 2 contains the personal information of the appellant. In these circumstances, Order M-352 indicates that the exemption to consider with respect to a possible unjustified invasion of personal privacy is section 38(b), rather than section 14(1). Accordingly, section 14(1) does not apply in this case.

Under section 38(b), where a record contains the personal information of both the appellant and other individuals and the institution determines that the disclosure of the information would constitute an unjustified invasion of another individual's personal privacy, the institution has the discretion to deny the requester access to that information.

Disclosure of Record 2 could only be an unjustified invasion of the author's personal privacy if it contained her personal information. This record was prepared in its author's professional capacity. Many previous orders (see, for example, Order M-25) have held that a record prepared in an individual's professional capacity, and which does not relate to that individual personally, does not constitute that individual's personal information. Since no part of Record 2 relates to its author in any personal way, I find that it does not contain the author's personal information, and in these circumstances, the exemption in section 38(b) cannot apply.

DISCRETION TO DENY REQUESTER'S OWN INFORMATION

Under section 38(a), the institution has the discretion to deny access to an individual's own personal information in instances where certain exemptions set out in Part I of the Act would otherwise apply to that information. The exemptions in sections 10 and 12 are both referred to in section 38(a). As a preliminary step in determining whether the exemption in section 38(a) applies, I will consider whether Record 2 qualifies for exemption under section 10, and whether Record 4 qualifies for exemption under section 12.

THIRD PARTY INFORMATION

The Board claims that Record 2 qualifies for exemption under section 10(1) of the Act.

Section 10(1)(b)

The Board's representations assert that disclosure of Record 2 could result in this type of information not being supplied in the future, in apparent reference to section 10(1)(b).

For a record to qualify for exemption under section 10(1)(b), each part of the following three-part test must be satisfied:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; **and**
2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; **and**
3. the prospect of disclosure of the record must give rise to a reasonable expectation that the harm specified in section 10(1)(b) will occur.

With respect to part 1 of the test, I find that Record 2 does not contain any trade secret or scientific, technical, commercial or financial information. In Order P-653, Inquiry Officer Holly Big Canoe made the following comment about the meaning of "labour relations information" in the context of section 17(1) of the provincial Freedom of Information and Protection of Privacy Act, which is the equivalent of section 10(1) of the Act:

In my view, the term "labour relations information" refers to information concerning the **collective** relationship between an employer and its employees.

I agree with this view, and adopt it for the purposes of this appeal. Record 2 contains no information about the collective relationship between an employer and its employees and accordingly, I find that disclosure of this record would not reveal any of the types of information referred to in the preamble to section 10(1). For that reason, part 1 of the test has not been met and the exemption cannot apply.

There are additional reasons why this record does not qualify for exemption under this section. Turning to the second part of the test, it is my view that the information which would be revealed by disclosure of the record must have been "supplied" by an external source. As previously noted, this record was written by a Board employee. It refers to "concerns" of certain parties external to the Board, but does not indicate what these concerns were. In my view, its disclosure would not reveal information which was "supplied" to the Board by an external source, and section 10(1)(b) does not apply.

Moreover, with respect to the third part of the test, section 10(1)(b) of the Act requires the Board to establish that disclosure could reasonably be expected to "result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied". The Board's representations make no reference to the public interest. Also, the author of this record is a Board employee, and the record was prepared in the course of her employment. In my view, the assertion that she would cease providing this type of information, which her employment duties require her to provide, has no reasonable basis. Accordingly, part 3 of the test has also not been met.

As noted above, each part of the test must be met in order to meet the requirements of section 10(1)(b). Therefore, failure to meet **any one** part of the test means that the exemption does not apply. Since Record 2 fails to meet any part of the test, it cannot qualify for exemption under section 10(1)(b).

Section 10(1)(d)

The Board's representations with respect to Record 2 also refer to section 10(1)(d). In this regard, the Board submits that "the record reveals labour relations information supplied in confidence".

Previous orders have established a test setting out the requirements to be met in order for a record to qualify for exemption under section 10(1)(d). The first two parts of this test are identical to parts 1 and 2 of the test set out above in my discussion of section 10(1)(b).

The third part of the test is somewhat different under section 10(1)(d), requiring the Board to establish that disclosure of the record could reasonably be expected to:

- (a) reveal information of the type set out in section 10(1) which was supplied to a conciliation officer, a mediator, a labour relations officer, or another person appointed to resolve a labour relations dispute;

OR

- (b) reveal the report of a conciliation officer, a mediator, a labour relations officer, or another person appointed to resolve a labour relations dispute.

As with section 10(1)(b), all three parts of this test must be met in order to qualify for exemption under section 10(1)(d).

As noted in my discussion of section 10(1)(b), above, the information in Record 2 does not come within any of the categories described in section 10(1). Accordingly, Record 2 does not meet part 1 of the test for exemption under section 10(1)(d).

My findings with respect to section 10(1)(b) also indicated that the information in Record 2 was not "supplied" to the Board within the meaning of section 10(1), and for this reason, part 2 of the test for exemption under section 10(1)(d) has also not been met.

Moreover, there is no evidence to indicate that this record was supplied to a conciliation officer, a mediator, a labour relations officer, or other person appointed to resolve a labour relations dispute, and it is apparent that the record does not reveal the report of such a person. Accordingly, part 3 of the test for exemption under section 10(1)(d) has also not been met.

As noted above, each part of the test must be met in order to meet the requirements of section 10(1)(d). Therefore, failure to meet **any one** part of the test means that the exemption does not apply. Since Record 2 fails to meet any part of the test, it cannot qualify for exemption under section 10(1)(d).

Because Record 2 does not qualify for exemption under section 10(1), it is not exempt under section 38(a).

SOLICITOR-CLIENT PRIVILEGE

The Board claims that Record 4 qualifies for exemption under section 12.

This exemption consists of two branches, which provide an institution with the discretion to refuse to disclose:

1. a record that is subject to the common law solicitor-client privilege (Branch 1); and
2. a record which was prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation (Branch 2).

In order for a record to be subject to the common law solicitor-client privilege (Branch 1), the institution must provide evidence that the record satisfies either of the following tests:

1. (a) there is a written or oral communication, and
(b) the communication must be of a confidential nature, and
(c) the communication must be between a client (or his agent) and a legal advisor, and
(d) the communication must be directly related to seeking, formulating or giving legal advice;

OR

2. the record was created or obtained especially for the lawyer's brief for existing or contemplated litigation.

I find that Record 4 qualifies for exemption under the first part of Branch 1 of this exemption, since its disclosure would reveal confidential communications between solicitor and client directly related to seeking, formulating or giving legal advice (Order 49). Accordingly, the exemption in section 38(a) applies to Record 4.

EVALUATIVE OR OPINION MATERIAL

The Board claims that this exemption, provided by section 38(c) of the Act, applies to Record 2.

Section 38(c) states as follows:

A head may refuse to disclose to the individual to whom the information relates personal information,

that is evaluative or opinion material compiled solely for the purpose of determining suitability, eligibility or qualifications for employment or for the awarding of contracts and other benefits by an institution if the disclosure would reveal the identity of a source who furnished information to the institution in circumstances where it may reasonably have been assumed that the identity of the source would be held in confidence;

In Order M-132, Assistant Commissioner Irwin Glasberg established what was, in effect, a four-part test for a record to qualify for exemption under section 38(c) of the Act. For the exemption to be successfully claimed, an institution and/or affected person must establish that:

1. The personal information is evaluative or opinion material;
2. The personal information was compiled solely for the purpose of determining suitability, eligibility or qualifications for employment or for the awarding of government contracts and other benefits;

3. The information was supplied to the institution in circumstances where it may reasonably have been assumed that the identity of the source would be held in confidence;
4. The disclosure of the record would reveal the identity of the source of the information.

Each element of the four-part test must be satisfied in order for the exemption to apply. The failure to meet any part of the test means that section 38(c) will not be available to exempt the personal information contained in the record from disclosure.

The Board's representations respecting this exemption, given in the form of an affidavit signed by the author of this record, state that:

The internal workplace report sets out my opinion regarding the grievance and contains certain recommendations. The memo was drafted for the purpose of determining suitability of [the appellant] for employment. When furnishing such information, my views were expressed in confidence and in the belief that such views or opinions would not be disclosed.

Turning to the part 3 of the test, it is significant that the Board's representations do not assert that there was any expectation that the **identity of the source** would be kept confidential, and no other evidence has been produced to indicate that this expectation existed, or had any reasonable basis. In and of itself, this would support a finding that part 3 of the test has not been met.

It is also significant that the author of Record 2 is a senior Board employee in the human resources area, and her employment responsibilities could be expected to require preparation of documents such as this. In my view, the author's position with the Board indicates that it would not be reasonable to assume that her identity as a source, with respect to this particular record, would be held in confidence.

I find that part 3 of the test has not been met and this exemption does not apply. As no other discretionary exemptions are under consideration with regard to Record 2, and no mandatory exemption applies, it should be disclosed.

REASONABLENESS OF SEARCH

Where a requester provides sufficient details about the records which he or she is seeking and the Board indicates that additional records do not exist, it is my responsibility to ensure that the Board has made a reasonable search to identify responsive records. While the Act does not require that the Board prove to the degree of absolute certainty that such records do not exist, the search which the Board undertakes must be conducted by knowledgeable staff in locations where the records in question might reasonably be located.

With respect to part 1 of the request (as summarized at the beginning of this order), which pertains to the appellant's personnel file, the Board has supplied an affidavit executed by its Records Analyst. The affidavit indicated that this individual contacted the Teaching Staffing Co-ordinator (the individual who maintains personnel files of this type) and obtained the appellant's complete personnel file, which was disclosed in full.

As outlined at the beginning of this order, parts 2 and 3 of the request pertain to the appellant's files maintained by the Board's Employee Relations Department, Legal Services Department, and any outside law firm retained by the Board. With respect to its search for records responsive to these parts of the request, the Board supplied the affidavit of its Manager of Employee Relations, who is also the Freedom of Information and Privacy Co-ordinator (the Co-ordinator).

The Co-ordinator's affidavit indicates that she personally conducted the search within the Board's Employee Relations Department (referred to in part 2 of the request), which she would be familiar with by virtue of her position as manager of that department. In this regard, she also consulted two Employee Relations officers concerning the existence of any responsive records. As a result of these searches, grievance notes for Steps 1 and 2 were located and disclosed, and Records 2, 3, 4 and 5 were also located. After the appeal was filed, the Co-ordinator conducted a further search within the Employee Relations Department, as a result of which one further record was located and disclosed.

With respect to part 3 of the request, the Co-ordinator's affidavit indicates that she met with the Board's solicitors to "respond to [the appellant]'s request for copies of legal documents which are in the custody or control of the Board". It is not clear whether this meeting was with in-house counsel or external solicitors. In any event, there is no indication that any search for records responsive to part 3 of the request was undertaken, either in-house or at the offices of any external solicitors retained by the Board.

The Board's decision letter states that "[l]egal advice regarding your grievance process was obtained verbally, and no documents were created". However, this statement is directly contradicted by the existence of Record 4 (as well as Records 3 and 5, which the Board has agreed to disclose). Moreover, not all records created in the course of a solicitor-client relationship contain legal advice. I also note that, although this letter was made an exhibit to one of the affidavits submitted by the Board, the statement just quoted is not mentioned anywhere in the Board's representations. For all these reasons, I do not accept the assertion that "no documents were created", and in my view, a search ought to have been conducted with respect to part 3 of the request.

Many of the comments in the appellant's representations refer to classes of records other than those at issue in this appeal, or to allegations which are outside the mandate of this office to investigate.

Based upon the representations and evidence provided, I am satisfied that the Board's searches for records with respect to parts 1 and 2 of the request were reasonable in the circumstances, since actual searches were conducted by staff who would be knowledgeable about the records they were seeking to find.

However, since I have been provided with no evidence of a search relating to part 3 of the request, and the Board's representations provide no grounds to justify a conclusion that a search need not have been undertaken, I am not satisfied that reasonable efforts were made in this regard. Accordingly, I will order the Board to do a further search for records with respect to part 3 of the request.

I note that the request made explicit reference to records in the custody of any law firm retained by the Board, as well as its Legal Services Department. In this regard, it is significant that some types of records in the custody of a law firm or independent solicitor retained by the Board could be under the **control** of the Board, and for this reason, they could be subject to the access scheme in the Act by virtue of sections 17(1) and 36(1).

To assist the Board in determining which responsive records in the custody of any law firm or independent solicitor retained by the Board would be under its control for the purposes of the Act, I will set out the following extract from Order M-371, in which I dealt with this subject.

In my view, records in the custody of a solicitor which are the property of a client may be said to be under the client's control for the purposes of the Act (Order M-315). Several legal authorities are relevant to the issue of ownership of client records in the custody of solicitors.

For instance, section 6(6) of the Solicitors' Act, R.S.O. 1990, c. S15, indicates that, in proceedings relating to solicitors' accounts, documents which belong to the client must be dealt with as the client instructs, upon payment of all outstanding fees. That section states as follows:

Upon payment by the client or other person of what, if anything, appears to be due to the solicitor, or if nothing is found to be due to the solicitor, the solicitor, if required, **shall** deliver to the client or other person, or as the client or other person directs, all deeds, books, papers and writings in the solicitor's possession, custody or power **belonging** to the client. (emphasis added)

In addition, this issue is addressed in a more general way in Aggio v. Rosenberg et al. (1981) C.P.C. 7, where the court quotes with approval from a text entitled The Law Relating to Solicitors (6th edition) by Corderley.

The Court reproduced the following excerpts from that textbook relating to ownership of solicitors' records:

Documents in existence before the retainer commences and sent to the solicitor by the client or by a third party during the currency of the retainer present no difficulty since their ownership must be readily apparent. The solicitor holds them as agent for and on behalf of the client or third party, and on the termination of the retainer must dispose of them (subject to any lien he may have for unpaid costs ...) as the client or third party may direct.

Documents which only come into existence during the currency of the retainer and for the purpose of business transacted by the solicitor pursuant to the retainer, fall into four broad categories:

- (i) Documents prepared by the solicitor for the benefit of the client and which may be said to have been paid for [by] the client, **belong to the client.**
- (ii) Documents prepared by the solicitor for his own benefit or protection, the preparation of which is not regarded as an item chargeable against the client, belong to the solicitor.
- (iii) Documents sent by the client to the solicitor during the course of the retainer, the property in which was intended at the date of despatch to pass from the client to the solicitor, e.g., letters, belong to the solicitor.
- (iv) Documents prepared by a third party during the course of the retainer and sent to the solicitor (other than at the solicitor's expense), e.g., letters, **belong to the client.** (emphases added).

I direct the Board to bear these considerations in mind in assessing whether any responsive records found in the custody of external solicitors retained by the Board are under the Board's control.

ORDER:

1. I uphold the Board's decision to deny access to Record 4.
2. I order the Board to disclose Records 1, 2, 3, 5 and 6 to the appellant within fifteen (15) days after the date of this order.
3. In order to verify compliance with Provision 2, I reserve the right to require the Board to provide me with a copy of the records disclosed to the appellant in accordance with that provision.

4. I order the Board to arrange for a review of any records responsive to part 3 of the request (as summarized at the beginning of this order) in the custody of any law firm or independent solicitor it has retained with respect to its relations with the appellant in order to determine which of these records are under its control, to communicate the results of this review to the appellant in writing, and to provide an access decision to the appellant with respect to any responsive records under its control, in the form contemplated by sections 19, 22 and 23 of the Act, all within thirty (30) days after the date of this order, without recourse to a time extension.
5. Should the Board have a Legal Services Department or any in-house counsel, I also order the Board to search the records of that department and/or counsel to determine whether any records responsive to part 3 of the request exist, to communicate the results of this search to the appellant in writing, and to provide an access decision to the appellant with respect to any responsive records located as a result of this search, in the form contemplated by sections 19, 22 and 23 of the Act, all within thirty (30) days after the date of this order, without recourse to a time extension.
6. In order to verify compliance with Provisions 4 and 5 of this order, I order the Board to provide me with a copy of the correspondence referred to in Provisions 4 and 5 within thirty-five (35) days after the date of this order. This should be sent to my attention, c/o Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario, M5S 2V1.

Original signed by: _____

John Higgins
Inquiry Officer

March 17, 1995 _____

I have been thinking of you very much lately, and wondering how you are getting on. I hope you are well and happy. I have been very busy lately, but I always find time to think of my friends.

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Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

URBAN MUNICIPAL

JUN 17 1996

GOVERNMENT DOCUMENTS

ORDER M-605

Appeal M-9500269

Board of Education for the City of Hamilton



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NATURE OF THE APPEAL:

This is an appeal under the Municipal Freedom of Information and Protection of Privacy Act (the Act). In September 1994 the appellant submitted a request to the Board of Education for the City of Hamilton (the Board), in several parts. The part of the request under consideration in this order was for a "... copy of my file from [the Board's] legal services department or legal office working for [the Board]".

To place the request in context, it is important to note that the appellant has been an occasional teacher with the Board, and has filed a grievance in response to her dismissal from an occasional teaching position at one of the schools operated by the Board. She is also involved in two ongoing disputes with the Board before the Ontario Labour Relations Board.

In its initial response to this part of the request, the Board indicated that no responsive records existed. The appellant filed an appeal of this decision with the Commissioner's office. This aspect of the Board's decision was dealt with in Order M-491, which I issued. In that order, I indicated that records in the custody of the Board's solicitors which are, in law, the property of the Board would be subject to the Board's control, and would thus be subject to the Act. I ordered the Board to conduct an additional search, and to include records in the Board's control which are in the custody of its solicitors.

The Board did so, and located eight responsive records. Five of these have been disclosed, and the remaining three records, consisting of correspondence between the Board and its solicitors, remain at issue in this appeal.

The Board has denied access to these three records in full, claiming that they are exempt from disclosure under the following exemptions in the Act:

- advice or recommendations - section 7(1)
- solicitor-client privilege - section 12.

The appellant filed an appeal of this denial of access with the Commissioner's office, and this appeal is the subject of this order. During mediation, the appellant agreed that the issues in this appeal are limited to whether the Board's denial of access is justified, based on the exemptions claimed.

A Notice of Inquiry was sent to the appellant and the Board. Representations were received from both parties.

Because the records appeared to contain the appellant's personal information, the Notice of Inquiry raised the possible application of section 38(a) of the Act (discretion to refuse requester's own information).

DISCUSSION:

DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual, including any identifying number assigned to the individual and the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual.

I have reviewed the three records at issue. All of them mention legal issues between the Board and the appellant, and for this reason, I find that all three records at issue contain her personal information.

Section 36(1) of the Act gives individuals a general right of access to their own personal information held by a government body. Section 38 provides a number of exceptions to this general right of access.

Under section 38(a) of the Act, the Board has the discretion to deny access to an individual's own personal information in instances where certain exemptions would otherwise apply to that information. This section states:

A head may refuse to disclose to the individual to whom the information relates personal information,

if section 6, 7, 8, 9, 10, 11, 12, 13 or 15 would apply to the disclosure of that personal information. (emphasis added)

In order to determine whether this exemption applies, I will analyse whether the records qualify for exemption under section 7(1) or 12 of the Act.

SOLICITOR-CLIENT PRIVILEGE

The Board claims that all three of the records at issue qualify for exemption under section 12 of the Act because they are subject to solicitor-client privilege. This section states:

A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation.

Section 12 consists of two branches, which provide an institution with the discretion to refuse to disclose:

1. a record that is subject to the common law solicitor-client privilege (Branch 1); and
2. a record which was prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation (Branch 2).

In order for a record to be subject to the common law solicitor-client privilege (Branch 1), the institution must provide evidence that the record satisfies either of the following tests:

1.
 - (a) there is a written or oral communication, **and**
 - (b) the communication must be of a confidential nature, **and**
 - (c) the communication must be between a client (or his agent) and a legal advisor, **and**
 - (d) the communication must be directly related to seeking, formulating or giving legal advice;

OR

2. the record was created or obtained especially for the lawyer's brief for existing or contemplated litigation. (Order 49).

Two of the records at issue are letters from the Board's solicitors to the Board. They are dated February 1, 1994 and May 29, 1995. The third record is a handwritten note from a Board employee to the Board's solicitors dated February 22, 1994.

In my view, all three of these letters are confidential written communications between a solicitor and client, and all three are directly related to the seeking or giving of legal advice. Therefore, the requirements to qualify for exemption under the first part of Branch 1 have been met. For this reason, I find that all three records qualify for exemption under section 12. Accordingly, I find that they are all exempt under section 38(a).

The appellant submits that the Board "... has notoriously hidden information in the guise of legal issues ...". In my view, this submission does not contradict the application of the exemption to the three records at issue. Section 12 of the Act provides a solicitor-client privilege exemption, and section 38(a) expressly provides that this exemption can apply to records containing the requester's personal information. I see nothing improper in the Board's decision to exempt these records. I also note that the Board has voluntarily disclosed a number of records for which it initially intended to claim this exemption.

Because of the way I have resolved this issue, it is not necessary for me to consider whether the records qualify for exemption under section 7(1).

I note that the Board's representations contain argument to the effect that this appeal is frivolous and vexatious. This issue is currently being considered in another appeal. Because of the finding I have made in this case, I am of the view that it is not necessary for me to consider this issue in this order.

ORDER:

I uphold the Board's decision.



Original signed by:

John Higgins
Inquiry Officer

September 28, 1995

I have the honor to acknowledge the receipt of your letter of the 10th inst. and in reply to inform you that the same has been forwarded to the proper authorities for their consideration. The same will be forwarded to you as soon as a decision has been reached.



I am, Sir, very respectfully,
Your obedient servant,
J. H. [Name]

Very respectfully,
J. H. [Name]

Enclosed for you are the following documents, which I have been instructed to forward to you for your information.

I am, Sir, very respectfully,
Your obedient servant,
J. H. [Name]

I have the honor to acknowledge the receipt of your letter of the 10th inst. and in reply to inform you that the same has been forwarded to the proper authorities for their consideration. The same will be forwarded to you as soon as a decision has been reached.

I am, Sir, very respectfully,
Your obedient servant,
J. H. [Name]

I have the honor to acknowledge the receipt of your letter of the 10th inst. and in reply to inform you that the same has been forwarded to the proper authorities for their consideration. The same will be forwarded to you as soon as a decision has been reached.

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URBAN MUNICIPAL

Commissioner/Ontario

Commissaire à l'information
et à la protection de la vie privée/Ontario

JUN 17 1996

GOVERNMENT DOCUMENTS

ORDER M-604

Appeal M-9500268

Board of Education for the City of Hamilton



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Fax/Téléc: 416-325-9195
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NATURE OF THE APPEAL:

This is an appeal under the Municipal Freedom of Information and Protection of Privacy Act (the Act). In September 1994 the appellant submitted a request to the Board of Education for the City of Hamilton (the Board), in several parts. The part of this request under consideration in this appeal was for "any material that relates to my union activity, attendance at workshops, notes, requests for union time off, etc.".

To place the request in context, it is important to note that the appellant has been an occasional teacher with the Board, and has filed a grievance in response to her dismissal from an occasional teaching position at one of the schools operated by the Board. She has also been a local official for a teachers' union.

The Board's initial response to this aspect of the request indicated that "we have previously provided copies of all documents in your personnel file". The appellant filed an appeal on the basis that she believed additional records, not previously disclosed to her by the Board, should exist within the Board's files. This appeal was resolved by the issuance of Order M-492.

In Order M-492, I upheld the Board's search with respect to requests for union time off, but ordered the Board "... to conduct a further search for records relating to the appellant's union activities, with the exception of requests for time off pertaining to union activities, to communicate the results of this search to the appellant in writing, and to provide an access decision to the appellant with respect to any responsive records located as a result of this search ...".

The Board conducted an additional search, located further records and disclosed them to the appellant. The appellant has now filed a further appeal relating to the searches conducted by the Board, alleging that additional responsive records exist.

A Notice of Inquiry was sent to the appellant and the Board. Both parties submitted representations.

DISCUSSION:

REASONABLENESS OF SEARCH

Where a requester provides sufficient details about the records which he or she is seeking and the Board indicates that additional records do not exist, it is my responsibility to ensure that the Board has made a reasonable search to identify responsive records. While the Act does not require that the Board prove to the degree of absolute certainty that such records do not exist, the search which the Board undertakes must be conducted by knowledgeable staff in locations where the records in question might reasonably be located.

In this case, the appellant's letter of appeal (which also pertains to another request which is the subject of a separate appeal) gives several examples of records which she believes should exist within the Board's files. However, none of these records pertains to "union activities" as defined

in Order M-492 (that is, activities relating to the appellant's general union activities, rather than her grievance).

The Board's representations (which consist of an affidavit by the Board's Freedom of Information and Privacy Co-ordinator) describe the efforts it has made to locate responsive records. These include the searches conducted at the request stage and in response to Order M-492, as well as efforts made after the current appeal was filed.

The appellant's representations include suggestions about what additional records may exist, and where they might be located, but I have not been provided with any indication that this information was ever communicated to the Board. Moreover, the Board's representations indicate that during this appeal (more particularly in May and June 1995), it made numerous unsuccessful attempts to reach the appellant for clarification. Despite leaving several answering machine messages, the Co-ordinator indicates that the appellant did not return her calls.

The appellant is seeking access to her own personal information. I would like to remind the appellant of the provisions of section 36(1)(b) of the Act (referred to in the Notice of Inquiry), which apply to requests for personal information, and which oblige requesters to provide specific information about records they are asking for. This section states:

Every individual has a right of access to,

any other personal information about the individual in the custody or under the control of an institution **with respect to which the individual is able to provide sufficiently specific information to render it reasonably retrievable by the institution.** (emphasis added).

As noted above, information about additional records and their possible locations was included in the appellant's representations to the Commissioner's office. In my view, in the circumstances of this case, that does not meet the requirements of section 36(1)(b). Providing this information at the representation stage is too late in the process to be of use to the Board, and in any event the information needs to be given to the Board, which has the responsibility of locating responsive records. Ideally, this information should be provided at the request stage.

I would also remind the appellant that, as I stated above (and in Order M-492), in appeals relating to whether a reasonable search was conducted, the Act **does not require that the Board prove to the degree of absolute certainty that such records do not exist.** Rather, the Act requires institutions to demonstrate that the efforts they made to locate responsive records were reasonable in the circumstances.

In my view, the efforts made by the Board in this case were more than reasonable.

ORDER:

I uphold the Board's decision.



Original signed by:

John Higgins

Inquiry Officer

September 28, 1995

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1995



Information and Privacy

Commissioner/Ontario

Commissaire à l'information

et à la protection de la vie privée/Ontario

URBAN MUNICIPAL

JUN 17 1996

GOVERNMENT DOCUMENTS

ORDER M-598

Appeal M-9500223

The Board of Education for the City of Hamilton



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Fax/Télé: 416-325-9195
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NATURE OF THE APPEAL:

This is an appeal under the Municipal Freedom of Information and Protection of Privacy Act, (the Act). The Board of Education for the City of Hamilton (the Board) received a request for access to "a print-out" showing the deductions from payments by the Board to its occasional teachers which were remitted to the teacher's bargaining agent between 1988 and the date of the request. The Board determined that the cost of providing the responsive records to the requester would be \$2,064 and asked her to remit payment of 50% of the estimated fee, in accordance with section 6 of Regulation 823/90 made under the Act.

The requester appealed the fee estimate provided to her. The Board subsequently provided the appellant with a revised fee estimate in the amount of \$3,528. The appellant then requested the Board to waive the fee in accordance with section 45(4) of the Act. The Board refused to grant the appellant a fee waiver and the appellant appealed this decision to the Commissioner's office as well.

There are, therefore, two issues to be determined in this appeal. First, I must determine the appropriateness of the fee estimate provided by the Board and, second, I must decide if the Board was correct in refusing to grant the appellant a fee waiver.

DISCUSSION:

CALCULATION OF FEES

The Board indicates that the retrieval of the information in the format sought by the appellant would require it to create a computer program. It submits that the creation of a new program is necessary because the existing computer printouts include the deductions made from evening and skill school teachers, as well as occasionals. In order to reduce the existing data to include only occasional teachers, it would be necessary to write a new computer program designed to capture only the information which the appellant seeks. It estimates that the time required to write the program would be 20 hours. The dollar value of the time spent creating the necessary program would, as described in the Board's correspondence with the appellant, be \$540 (20 hours x \$30 less 2 free hours).

In addition, the Board submits that the search time necessary to locate the requested information for the years 1993 to 1995 would be 38 hours, along with 6 hours to sever the personal information contained therein. For the years 1988 to 1992, the Board estimates that it would take one hour to locate the correct computer tapes and 33 hours to actually run and retrieve the requested information, using the new computer program. The total estimated time incurred for actual search and record preparation would, accordingly, be 78 hours. The dollar value of the time spent searching for and preparing the record for disclosure is, according to the calculations of the Board, \$2240 (78 hours x \$30).

Further, the Board submits that it would be required to make 390 pages of photocopies to respond to the request, for a total of \$78 (390 pages x \$0.20).

With her representations, the appellant supplied this office with sample copies of the documents which she is seeking. The sample record is five pages long and lists the monthly deductions made by the Board to evening school and occasional teacher payments which is then remitted to the teachers' bargaining agent. The appellant maintains that the records she is seeking consist only of these monthly reports which have been filed with the bargaining agent since 1988. She submits that there is no need to incur the kind of expense described in the fee estimate provided by the Board as the records already exist in the format which she requested.

The appellant did not share this information with the Board and failed to respond to the many attempts made by the Board to clarify the nature and extent of her request. In my view, the Board was correct in taking the approach that the appellant was seeking only information about union remittances made by occasional teachers and that to extract that information from its records system would entail the creation of a computer program. It is now apparent, however, that the appellant's request may be answered to her satisfaction through the provision of photocopies of the remittances made by the Board for its occasional, evening school and skill school teachers for the requested period.

I will, accordingly, allow the Board to charge a fee for the provision of this information only. In my view, this fee may be calculated as indicated below.

Photocopies

The appellant's documents indicate that the requested printout is five pages long and is remitted to the bargaining agent on a monthly basis. The fee which may be charged is, accordingly, calculated as follows:

$$5 \text{ pages per month} \times 12 \text{ months} \times 6.5 \text{ years} = 390 \text{ pages} \times \$0.20 \text{ per page} = \$78.00.$$

Should greater or fewer copies actually be required, the Board may charge the requisite \$0.20 per page for such copies.

Search and Preparation Time

I am prepared to allow the Board ten hours search time to identify and locate the appropriate responsive records in its computer system. As printouts of the information sought by the appellant are made each month when the remittances are made to the bargaining agent, this information is retrievable without the creation of a new computer program. Search time may, therefore, be charged for eight hours (ten hours less 2 free hours) x \$30 per hour for a total of \$240.

In addition, the Board may wish to sever certain information from the responsive records. In the circumstances of this appeal and considering the nature of the records requested, I am

prepared to allow the Board to charge a fee, calculated as follows, for the preparation of the record for disclosure:

390 pages x 1 minute per page = 5.5 hours x \$30 per hour = \$165.

The total fees allowed for photocopies, search and preparation time are, accordingly, \$483.

FEE WAIVER

In her fee waiver request, the appellant submits that the Board should waive payment of the fee in the circumstances as to decline to do so would cause her economic hardship. Section 45(4)(b) of the Act states:

A head shall waive the payment of all or any part of an amount required to be paid under this Act if, in the head's opinion, it is fair and equitable to do so after considering,

whether the payment will cause a financial hardship for the person requesting the record;

It has been established in a number of previous orders that a person requesting a fee waiver must justify such a request. The appellant simply submits that the fee waiver is necessary as the payment of the fee will cause her a financial hardship. No further evidence as to her present financial circumstances was provided by the appellant. I am also mindful of the Legislature's intention to include a user pay principle in the Act, as evidenced by the provisions of section 45.

Section 45(4) creates an exhaustive list of the matters the Board is required to consider in determining if a waiver of all or any part of a fee is appropriate. Previous orders have set out a number of factors to be considered to determine whether a denial of a fee waiver is "fair and equitable".

I have carefully considered the Board's representations in light of the factors identified in previous orders, as well as the appellant's request for waiver. I find that a waiver of the fee in the circumstances of this appeal would shift an unreasonable burden of the cost of access from the appellant to the Board. I find, therefore, that the Board's refusal to provide a waiver of the fees to be fair and equitable in the circumstances of this appeal.

ORDER:

1. I allow the charge for search and preparation time in the amount of \$405.
2. I allow the charge for providing photocopies in the amount of \$0.20 per page.

3. I uphold the decision of the Board not to waive the fee.



Original signed by: _____

Donald Hale
Inquiry Officer

September 22, 1995 _____



Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

URBAN MUNICIPAL

JUN 17 1996

GOVERNMENT DOCUMENTS

ORDER M-597

Appeal M-9500222

The Board of Education for the City of Hamilton



NATURE OF THE APPEAL:

The Board of Education for the City of Hamilton (the Board) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to copies of the interviewer's notes at the requester's interview for a long-term occasional position with the Board. The Board located the interview notes which were responsive to the request and granted access to them in their entirety. The requester appealed this decision, arguing that a front cover sheet and back score sheet which should have been attached to the notes was not disclosed to her.

A Notice of Inquiry was provided to the appellant and the Board. Representations were received from both parties. The sole issue to be determined in this appeal is whether the Board's search for records responsive to the appellant's request was reasonable in the circumstances.

DISCUSSION:

REASONABLENESS OF SEARCH

The Board's representations include an affidavit sworn by its Freedom of Information Co-ordinator in which she describes in detail the efforts made to locate the front and back sheets which are the subject of this appeal. The Co-ordinator conducted a search of files relating to the appellant which are located at the offices of the Board's solicitors as well as in the files maintained by the Board. The Co-ordinator located the back page, which had not been completed by the interviewers, but was unable to locate a copy of the cover sheet. I find that the uncompleted back page is responsive to the appellant's request and order the Board to issue to the appellant a decision letter stating whether access will be granted to it.

The appellant submits that in response to other requests for interview notes, she has been provided with a cover sheet indicating the date, location and the names of staff who conducted the interview.

Where a requester provides sufficient details about the records which he or she is seeking and the Board indicates that such a record does not exist, it is my responsibility to ensure that the Board has made a reasonable search to identify any records which are responsive to the request. The Act does not require the Board to prove with absolute certainty that the requested record does not exist. However, in my view, in order to properly discharge its obligations under the Act, the Board must provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate records responsive to the request.

I have reviewed the representations of the parties and I am satisfied that the Board has conducted a thorough search for the cover page which forms part of the appellant's request. Accordingly, I find that the Board's search for records responsive to this portion of the request was reasonable in the circumstances of this appeal.

ORDER:

1. I order the Board to provide the appellant with a decision regarding access to the back page of the interview notes within fifteen (15) days of the date of this order.
2. I uphold the Board's decision with regard to the cover page portion of the appellant's request.
3. In order to verify compliance with Provision 1 of this order, I order the Board to provide me with a copy of the decision letter referred to in Provision 1 within twenty-one (21) days of the date of this order. This letter should be forwarded to my attention, c/o Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Toronto, Ontario M5S 2V1.



Original signed by:

Donald Hale
Inquiry Officer

September 22, 1995

The first of these is the fact that the American Medical Association is the only organization in the world which is composed of physicians and surgeons. This is a unique feature of the organization and is one of the reasons why it is so successful in its efforts to protect the interests of the public.

The second of these is the fact that the American Medical Association is the only organization in the world which is composed of physicians and surgeons. This is a unique feature of the organization and is one of the reasons why it is so successful in its efforts to protect the interests of the public.

The third of these is the fact that the American Medical Association is the only organization in the world which is composed of physicians and surgeons. This is a unique feature of the organization and is one of the reasons why it is so successful in its efforts to protect the interests of the public.

The fourth of these is the fact that the American Medical Association is the only organization in the world which is composed of physicians and surgeons. This is a unique feature of the organization and is one of the reasons why it is so successful in its efforts to protect the interests of the public.

The fifth of these is the fact that the American Medical Association is the only organization in the world which is composed of physicians and surgeons. This is a unique feature of the organization and is one of the reasons why it is so successful in its efforts to protect the interests of the public.



The sixth of these is the fact that the American Medical Association is the only organization in the world which is composed of physicians and surgeons. This is a unique feature of the organization and is one of the reasons why it is so successful in its efforts to protect the interests of the public.

The seventh of these is the fact that the American Medical Association is the only organization in the world which is composed of physicians and surgeons. This is a unique feature of the organization and is one of the reasons why it is so successful in its efforts to protect the interests of the public.

The eighth of these is the fact that the American Medical Association is the only organization in the world which is composed of physicians and surgeons. This is a unique feature of the organization and is one of the reasons why it is so successful in its efforts to protect the interests of the public.

The ninth of these is the fact that the American Medical Association is the only organization in the world which is composed of physicians and surgeons. This is a unique feature of the organization and is one of the reasons why it is so successful in its efforts to protect the interests of the public.

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The eleventh of these is the fact that the American Medical Association is the only organization in the world which is composed of physicians and surgeons. This is a unique feature of the organization and is one of the reasons why it is so successful in its efforts to protect the interests of the public.

The twelfth of these is the fact that the American Medical Association is the only organization in the world which is composed of physicians and surgeons. This is a unique feature of the organization and is one of the reasons why it is so successful in its efforts to protect the interests of the public.

The thirteenth of these is the fact that the American Medical Association is the only organization in the world which is composed of physicians and surgeons. This is a unique feature of the organization and is one of the reasons why it is so successful in its efforts to protect the interests of the public.

The fourteenth of these is the fact that the American Medical Association is the only organization in the world which is composed of physicians and surgeons. This is a unique feature of the organization and is one of the reasons why it is so successful in its efforts to protect the interests of the public.

The fifteenth of these is the fact that the American Medical Association is the only organization in the world which is composed of physicians and surgeons. This is a unique feature of the organization and is one of the reasons why it is so successful in its efforts to protect the interests of the public.

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Commissaire à l'information
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URBAN MUNICIPAL

JUN 17 1996

GOVERNMENT DOCUMENTS

ORDER M-596

Appeal M-9500220

The Board of Education for the City of Hamilton



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NATURE OF THE APPEAL:

The Board of Education for the City of Hamilton (the Board) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to statistics and information maintained by the Board concerning its "sexual harassment and gender bias complaints, policy and practice" as well as the "outcomes/resolutions" of any such complaints. The requester is a former occasional teacher with the Board.

The Board advised the requester that records responsive to her request, specifically statistical information about sexual harassment and gender bias complaints and their ultimate dispositions, are not compiled or distributed by the department which handles these matters. Accordingly, the Board advised the appellant that no responsive records exist. The requester appealed this decision.

A Notice of Inquiry was provided to the Board and to the appellant. Representations were received from both parties. The sole issue to be determined in this appeal is whether the Board's search for records responsive to the appellant's request was reasonable in the circumstances.

DISCUSSION:

REASONABLENESS OF SEARCH

Where a requester provides sufficient details about the records which he or she is seeking and the Board indicates that such a record does not exist, it is my responsibility to ensure that the Board has made a reasonable search to identify any records which are responsive to the request. The Act does not require the Board to prove with absolute certainty that the requested record does not exist. However, in my view, in order to properly discharge its obligations under the Act, the Board must provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate records responsive to the request.

The Board has provided an explanation of its efforts to clarify the appellant's request and to locate records which are responsive to her request. As all complaints of sexual harassment or gender bias are directed to the Board's Employment Equity Co-ordinator, this individual was asked to perform a search for records responsive to the request. This search failed to locate any responsive records. The appellant was advised during the mediation stage of the appeal that statistical reports on the number of such complaints, and the resolution of such complaints are not compiled by the Board's Employment Equity office.

The appellant has not provided any information as to why she believes that responsive records should exist.

I have considered the representations of the parties and I am satisfied that no records exist which would be responsive to the appellant's request. Accordingly, I find that the Board's search for responsive records was reasonable in the circumstances of this appeal.

ORDER:

I uphold the Board's decision that responsive records do not exist.



Original signed by: _____
Donald Hale
Inquiry Officer

September 22, 1995 _____

The report of the Committee on the State of the Nation, as presented to the House of Representatives on January 12, 1964, contains a number of recommendations which are being considered by the House. The Committee on the State of the Nation, which was established by the House on January 12, 1964, is a permanent committee. The report is a long document.

The House has also received a report from the Committee on the State of the Nation, which was established by the House on January 12, 1964. The report is a long document.



A list of names is provided at the end of the report. The names are listed in alphabetical order.

EXHIBIT 101-101
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RECOMMENDATIONS OF THE COMMITTEE

The Committee on the State of the Nation has recommended that the House should take certain steps to improve the efficiency of its operations. The Committee has also recommended that the House should take certain steps to improve the quality of its work. The Committee has also recommended that the House should take certain steps to improve the morale of its members.

The House has also received a report from the Committee on the State of the Nation, which was established by the House on January 12, 1964. The report is a long document.

The report is a long document.

I have considered the recommendations of the Committee, and I am making the following recommendations to the House. I believe that the House should take certain steps to improve the efficiency of its operations. I believe that the House should take certain steps to improve the quality of its work. I believe that the House should take certain steps to improve the morale of its members.



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